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Supreme Court of the United States

October Term, 1940.

No. 256

LOUIS E. RODDEWIG, AS CHAIRMAN OF THE IOWA STATE BOARD OF ASSESSMENT AND REVIEW, AND INDIVIDUALLY; D. L. MURROW AND C. FRANK GREEN, AS MEMBERS OF THE IOWA STATE BOARD OF ASSESSMENT AND REVIEW, AND INDIVIDUALLY,

Petitioners,

vs.

MONTGOMERY WARD & CO. INCORPORATED,

Respondent.

BRIEF FOR RESPONDENT.

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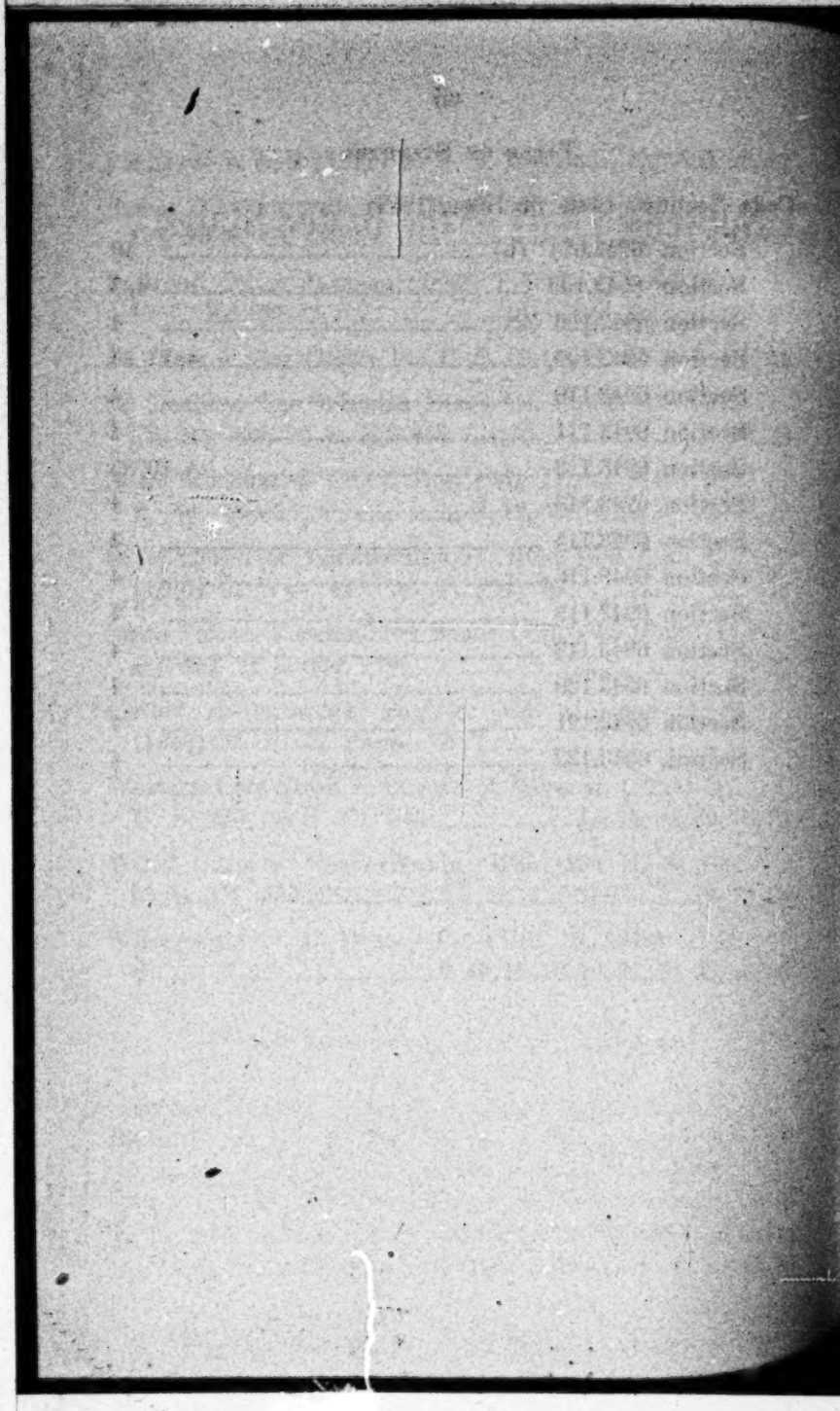

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Petitioners,

vs.

MONTGOMERY WARD & CO., INCORPORATED,

Respondent.

BRIEF FOR RESPONDENT.

OPINION OF THE COURT BELOW.

The opinion of the Supreme Court of Iowa in this case is to be found at 292 N. W. 142 and in the record at p. 101. The opinion refers to that in *Roddewig, et al. v. Sears, Roebuck and Co.*, reported at 292 N. W. 130. (The opinion of the district court of Polk County, Iowa, is to be found in the record, beginning at p. 63.)

STATEMENT OF THE CASE.

HOW THE ISSUES AROSE.

This case arose on respondent's request of the district court of Polk County, Iowa, that petitioners be enjoined from carrying out their threat to cancel the permit previously issued respondent to operate retail establishments in Iowa (R. 12) and to seek cancellation of respondent's permit to do business in Iowa (R. 13), if respondent failed to comply with all provisions of the Iowa Use Tax Act.

The injunction was sought on the ground that certain provisions of the Iowa Use Tax Act requiring the respondent to collect from its customers the amount of the Iowa Use Tax were invalid for a number of reasons arising under the Constitutions of Iowa and of the United States.

Two of these several reasons were, first, that the burden of these provisions fell upon activities of the respondent outside the jurisdiction of Iowa, and, second, that the burden of these provisions fell upon activities in interstate commerce in such a manner as to offend against the commerce clause.

The answer of the petitioners put the several constitutional questions in issue. A trial was held, and evidence (all of it undisputed) was taken.

HOW THE ISSUES WERE DECIDED.

The district court held that the challenged provisions of the Iowa Use Tax Act were invalid because they infringed upon the rights of the respondent both under Section 1 of the Fourteenth Amendment to the Constitution of the United States and under Section 8 of Article I of that Constitution. (R. 75)

The majority of the Supreme Court of Iowa also found the challenged provisions invalid, resting the decision primarily on the Fourteenth Amendment. A minority of the Iowa Supreme Court, dissenting in part, nevertheless concurred in holding that the challenged provisions were invalid as applied to some of the fact situations disclosed by the record. This opinion was also predicated upon the Fourteenth Amendment, but for somewhat different reasons.

Neither of the courts below found it necessary to pass upon the allegations that the challenged provisions offended against certain provisions of the Constitution of Iowa. These contentions of the respondent, however, have not been waived or abandoned.

THE CHALLENGED PROVISIONS OF THE IOWA USE TAX ACT.

The respondent has never challenged the validity of the Use Tax Act in so far as it imposes a *tax* upon the use within Iowa of merchandise as to which no sales tax has been paid. The respondent has at all times limited its challenge to those provisions of the Act which impose upon retailers the burden of *collecting the tax* from those upon whom it is laid. This burden is distinct from the tax, and is part of a scheme of tax collection created by

the following portions of the Iowa Use Tax Act: sections 4, 5 (par. 2), 8, 9, 10, 11, 12, 14, 15, 17, 18, 19, 20, and 21 (these provisions are contained in Sections 6943.105, 6943.106 (2), 6943.109, 6943.110, 6943.111, 6943.112, 6943.113, 6943.115, 6943.116, 6943.118, 6943.119, 6943.120, 6943.121, 6943.122, respectively, of the Code of Iowa, 1939, and are set out in full as Appendix "B" to the petitioners' brief.) Henceforth in this brief these portions of the Use Tax Act which set forth the scheme of tax collection will for convenience be called, insofar as they relate to this scheme of tax collection, the "collection provisions", or the "challenged provisions" of the Act.

The duty of tax collection is first described in section 8 of the Act in these words:

> "Every retailer maintaining a place of business in this state and making sales of tangible personal property for use in this state * * * shall, *at the time of making such sales, whether within or without the state,* collect the tax imposed by this act from the purchaser * * *." (italics added)
>
> (Sec. 6943.109 of the Code of Iowa, 1939)

In addition, the retailer may be required to give the purchaser a receipt (Sec. 8). Section 11 provides:

> "The tax herein required to be collected by any retailer * * * shall constitute a debt owed by the retailer to this state".
>
> (Sec. 6943.112 of the Code of Iowa, 1939)

Quarterly returns must be filed by the retailer covering, among other matters:

> "the sales price of any or all tangible personal property sold by the retailer during such preceding quarterly period, the use of which is subject to the tax imposed by this act".
>
> (Sec. 6943.113 of the Code of Iowa, 1939)

Penalties are provided for delay in filing returns (Sect. 17) and for failure to furnish requested information (Sect. 19). The retailer must keep such records of sales and such documentary evidence of them as may be required; which must be

> "made available within this state for such examination"

(Sec. 6943.121 of the Code of Iowa, 1939)

Failure to comply may be further penalized by revocation both of the retailer's permit to do a retail business and of its license as a corporation to do any business in Iowa.

No other guide for determining when the duty of collection arises is furnished by the statute except that

> "evidence that tangible perronal property was sold by any person for delivery in this state shall be *prima facie* evidence that such tangible personal property was sold for use in this state"

Sec. 6943.105 of the Code of Iowa, 1939)

However, the liability for collection is not limited to sales calling for delivery in Iowa. No provision is made for refund of taxes paid by a retailer if the buyer does not in fact use the merchandise within the state.

THE FACTS.

The petitioners argue that the challenged provisions are constitutional when applied to respondent's "mail order business" (See petitioners' brief, p. 5). The petitioners describe respondent's "mail order business" as follows:

> "In addition to the business conducted in Iowa, this corporation conducts a mail order business through mail order stores or establishments located outside of Iowa. From time to time mail order catalogs are sent to prospective customers in Iowa and the Iowa customers send orders by mail to such mail

order stores located outside of Iowa and the orders are there filled and the merchandise shipped to the purchasers in Iowa."

(Petitioners' brief, p. 3)

This statement is correct in a sense, but omits many important facts. Many of these omitted facts will be discussed in the course of this argument in connection with the legal questions which make them important, so no attempt will be made to list them at this point.

At the most, the passage quoted from the petitioners' brief describes in general terms only the normal "mail order sale" which precedes a use in Iowa. However, the circumstances surrounding the various sales followed by use in Iowa which make up the "mail order business" of this respondent differ from transaction to transaction. The following are some of the obvious variations:

1. A customer having an Iowa post office address may send an order to the respondent calling for delivery to himself at a freight point just outside the state of Iowa.[1]

2. A customer having a post office address in another state may send an order to the respondent calling for delivery at a freight point within the state of Iowa.[1]

3. A resident of some other state may order merchandise from the respondent to be sent to a member of his family resident in Iowa, or to be sent as a gift to a resident in Iowa.[2]

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(1) The frequent variance between post office addresses and railroad freight points is illustrated by the provisions in the order blanks included in the catalogues. Obviously the forms must be concise yet they include a request that the shipping point be stated if it differs from the post office address. See p. 931 Exhibit B, p. 827 Exhibit C, p. 773 Exhibit D, p. 925 Exhibit E, p. 831 Exhibit F, p. 881 Exhibit G. Where the customer's residence is near the state boundary, the freight point may of course be in another state.

(2) The catalogue order blanks also include a space for giving such instructions. See p. 932 Exhibit B, p. 828 Exhibit C, p. 774 Exhibit D, p. 926 Exhibit E, p. 832 Exhibit F, p. 882 Exhibit G.

4. A customer in Iowa to whom the respondent has not sent a catalog may write for information about some particular item of merchandise and order on the strength of information sent by letter in reply to his request.[3]

5. A customer to whom a catalog has been sent to an Iowa address may order from some point outside the state of Iowa where he is vacationing, asking for shipment to his temporary address of articles he intends to use in Iowa.

6. A resident of Iowa temporarily located elsewhere to whom no catalog has been sent examines the catalog of another, sends an order to respondent calling for shipment to himself at the out-of-state point.[4]

As will be pointed out in the course of this argument, the duty of collection arises if the sale is for use in Iowa irrespective of whether the fact is known to the seller, or irrespective of whether delivery was or was not made to a point in Iowa. The Act was so interpreted by the Supreme Court of Iowa in the decision now before this Court on review.

Consequently, the duty of collection as applied to the "mail order business" of the respondent, involves the determination "at the time of making a sale" under any of the circumstances enumerated above, of the question whether the merchandise sold would later be used in Iowa. The existence of the duty of collection with respect to a mail order sale thus depends upon a fact which takes place subsequent to the time specified for the performance of the duty.

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(3) Customers are invited to write for assistance. For example see pp. 118 and 597 of Exhibit F.

(4) The references in footnote 2 equally support the variations illustrated in examples numbered 5 and 6.

We shall, in the course of argument, show more fully that the activities included or associated with the making of the "mail order sales" embraced within the issues all take place outside Iowa.

On August 1, 1938, the respondent operated 596 retail stores (R. 36) and nine mail order houses (R. 27) throughout the United States of which only 29 retail stores were located within the state of Iowa (R. 27). At least 6 of the out-of-the-state stores had trade areas extending into Iowa, and made considerable sales to Iowa customers for use in Iowa (R. 36). The amount of other sales to Iowa customers on vacation or traveling in other states, but for use in Iowa, were doubtless considerable, but obviously difficult to compute or estimate.

Sales made by out-of-state retail stores to Iowa customers are covered by the language of the Act just as much as "mail order sales". The petitioners now ask that the act not be applied to them. However, they factually parallel each characteristic of "mail order sales". Such retail store sales may have resulted from advertising literature mailed to the customer in Iowa or from advertisements placed in newspapers delivered to him in Iowa. The orders may have been placed by a telephone call to the out-of-state retail store just across the border from the home of an Iowa resident. The sales may have been consummated by placing merchandise on the truck of a carrier for delivery in Iowa (R. 36).

The evidence clearly showed that the respondent would suffer irreparable damage should the petitioners be permitted to carry out their threats, and that the respondent had no adequate remedy at law.

SUMMARY OF ARGUMENT.

I. The Application Of The Collection Provisions Of The Iowa Use Tax Act To Any Of Respondent's Sales Included Within The Issues Of This Case Would Amount To An Invalid Regulation Of Transactions Occurring Outside Of The Territorial Boundaries Of The State Of Iowa.

A. A State May Not Impose Burdens Which In Their Incidence Fall Upon Activities Outside Of The State Or Which Are Measured By Activities Not Directly Related To Privileges Exercised Within The State.

Wisconsin v. *J. C. Penney Co.* (Dec. 16, 1940) — U. S. —

St. Louis v. *The Wiggins Ferry Co.* (1871) 11 Wall. (U. S.) 423, 20 L. Ed. 192.

Ogden v. *Saunders* (1827) 12 Wheat. 213, 6 L. ed. 606.

Baldwin v. *Hale* (1864) 1 Wall. (U. S.) 223, 17 L. ed. 531.

Pennoyer v. *Neff* (1877) 95 U. S. 714, 24 L. ed. 565.

Great Atlantic & Pacific Tea Co. v. *Grosjean* (1937) 301 U. S. 412, 57 S. Ct. 772.

James v. *Dravo Contracting Co.* (1937) 302 U. S. 134, 58 S. Ct. 208.

Connecticut General Life Ins. Co. v. *Johnson* (1938) 303 U. S. 77, 58 S. Ct. 436.

Osborn v. *Ozlin* (1940) 310 U. S. 53, 60 S. Ct. 758.

Airway Electric Appliance Corp. v. *Day* (1924) 266 U. S. 71, 45 S. Ct. 12.

Lawrence v. *State Tax Commission* (1932) 286 U. S. 276, 52 S. Ct. 556.

B. The Burden Imposed By the Collection Provisions Of The Iowa Use Tax Act As Applied To Those Of Respondent's "Mail Order Sales" Embraced Within The Issues Of The Case At Bar Falls Directly Upon Transactions And Activities Outside The Territorial Boundaries Of The State Of Iowa.

1. The Supreme Court Of Iowa Has Interpreted The Iowa Statute As Imposing The Burden Of Tax Collection Upon The Activity Of Making Sales.

Wisconsin v. *J. C. Penney Co.* (Dec. 16, 1940) — U. S. —

Henderson v. *Mayor of New York* (1876) 92 U. S. 259, 23 L. ed. 543.

2. The Challenged Provisions Of The Iowa Statute By Their Explicit Terms Impose The Burden Of Collection Upon The Specific Act Of Making Sales.

3. The Actual Economic Incidence Of The Burden Of Tax Collection, As Separate And Distinct From The Burden Of The Tax Itself, Does In Fact Fall Upon The Activity Of Making Sales And Not Upon Such Other Activities As That Of Use By The Customers Within The State.

a. The Burden Of Acting As A Tax Collector Under An Obligation To Make The State Whole For Any Tax Not In Fact Collected Has Been Recognized By This Court As A Substantial One.

(Section 6943.112 of the Code of Iowa, 1939.)

Railroad Co. v. *Jackson* (1869) 7 Wall. (U. S.) 262, 19 L. ed. 88.

State Tax on Foreign-held Bonds (1873) 15 Wall. (U. S.) 300, 21 L. ed. 179.

New York, Lake Erie, and W. R. Co. v. *Pennsylvania* (1894) 153 U. S. 628, 14 S. Ct. 952.

b. The Burden Of Tax Collection Is Economically Substantial Apart From The Liability For Any Uncollected Portion Of The Tax Itself.

c. The Incidence Of The Burden Of Tax Collection Does Not Fall Upon The Activity Of Use Within Iowa, But Increases The Expense Of, And Decreases The Net Profit From, The Activity Of Making Sales.

Connecticut General Life Ins. Co. v. *Johnson* (1938) 303 U. S. 77, 58 S. Ct. 436.

4. The Activity Of Making The Sales Embraced Within The Issues Of The Present Case Occurred Outside Iowa.

5. The Entire Activity Which Included Making The Sales Embraced Within The Issues Of The Present Case Is Dissociated From The Exercise Of Any Privilege Granted The Respondent By Iowa.

St. Clair v. *Cox* (1882) 106 U. S. 350, 1 S. Ct. 354.

a. The Activities Of Purchasers From Respondent Do Not Give Jurisdiction To The State Of Iowa.

Wisconsin v. *J. C. Penney Co.* (Dec. 16, 1940) — U. S. —.

Connecticut General Life Ins. Co. v. *Johnson* (1938) 303 U. S. 77, 58 S. Ct. 436.

b. The Assumption That Intrastate Activities Take Place When No Showing As To Them Is Made Does Not Give Jurisdiction To Iowa, Especially When The Record Specifically Rebuts The Existence Of Them.

c. **The Fact That Respondent's Activities May Have Economic Repercussions In Iowa Does Not Bring Them Within The Jurisdiction Of Iowa.**

Connecticut General Life Ins. Co. v. *Johnson* (1938) 303 U. S. 77, 58 S. Ct. 436.

C. **The Measure Of The Burden Imposed By The Provisions Of The Iowa Use Tax Act Has No Proper Relation To The Value Of Any Privilege Granted The Respondent By Iowa.**

Wisconsin v. *J. C. Penney Co.* (Dec. 16, 1940) ___ U. S. ___

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Great Atlantic & Pac. Tea Co. v. *Grosjean* (1937) 301 U. S. 412, 57 S. Ct. 524.

Equitable Life Assur. Soc. v. *Pennsylvania* (1915) 238 U. S. 143, 35 S. Ct. 829.

Compania General de Tabacos v. *Collector* (1927) 275 U. S. 87, 48 S. Ct. 100.

D. **None Of The Cases Cited By Petitioners Supports The Validity Of The Collection Provisions Of The Iowa Use Tax Act As Applied To The Facts Before The Court.**

Discussing:

Henneford v. *Silas Mason Co.* (1937) 300 U. S. 577, 57 S. Ct. 524.

McGoldrick v. *Berwind-White Coal Mining Co.* (1940) 309 U. S. 33, 60 S. Ct. 388.

Jagels "a fuel corporation" v. *Taylor* (1940) 309 U. S. 619, 60 S. Ct. 469.

McGoldrick v. *A. H. Du Grenier, Inc.*, (1940) 309 U. S. 70, 60 S. Ct. 404.

McGoldrick v. *Felt & Tarrant* (1940) 309 U. S. 70, 60 S. Ct. 404.

Pierce Oil Corp. v. *Hopkins* (1924) 264 U. S. 137, 44 S. Ct. 251.

Monamotor Oil Co. v. *Johnson* (1934) 292 U. S. 86, 54 S. Ct. 575.

Felt & Tarrant Mfg. Co. v. *Gallagher* (1939) 306 U. S. 62, 59 S. Ct. 376.

Felt & Tarrant Mfg. Co. v. *Corbett* (1938) 23 Fed. Supp. 186.

II. The Collection And Payment Provisions Of The Iowa Use Tax Statute Violate The Commerce Clause Of The Constitution.

McGoldrick v. *Berwind-White Coal Mining Co.* (1940) 309 U. S. 33, 60 S. Ct. 389.

A. State Laws Which Potentially Subject Commerce To Multiple Burdens Violate The Commerce Clause.

Western Live Stock v. *Bureau of Revenue* (1938) 303 U. S. 250, 58 S. Ct. 546.

McGoldrick v. *Berwind-White Coal Mining Co.* (1940) 309 U. S. 33, 60 S. Ct. 388.

Adams Mfg. Co. v. *Storen* (1938) 304 U. S. 307, 58 S. Ct. 913.

B. To Uphold The Collection And Payment Provisions Of The Iowa Statute Would Subject Interstate Commerce Transactions To Multiple Burdens.

C. The Cases Cited By Petitioners Are Not Cases In Which A Potential Double Burden On Interstate Commerce Appeared.

Felt & Tarrant v. *Gallagher* (1939) 306 U. S. 62, 59 S. Ct. 376.

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Western Live Stock v. *Bureau of Revenue* (1938) 303 U. S. 250, 58 S. Ct. 546.

ARGUMENT.

Introduction.

Section 8 of the Iowa Use Tax Act reads in part:

> "Every retailer maintaining a place of business in this state and making sales of tangible personal property for use in this state * * * shall *at the time of making such sales, whether within or without the state,* collect the tax imposed by this act from the purchaser." (Italics added.)
>
> (Section 6943.109 of the Code of Iowa, 1939)

This section does not speak of "mail order business", "mail order transactions", or "mail order houses", although throughout petitioners' brief these terms are used as if the statute were designed and intended solely to cover such transactions or such businesses, and as if the issues in this case involved only such transactions and businesses.

The Supreme Court of Iowa did not doubt that the collection provisions of the Iowa Use Tax Act, including Section 8 quoted above, literally applied to all sales made by the respondent through any medium for use in Iowa. The majority specifically held the act unconstitutional as to sales for use in Iowa made through "so-called" border stores, thus holding it applicable to them. The dissenting opinion of Chief Justice Hamilton in the Iowa Supreme Court agreed with the majority opinion both as to the interpretation of the Act and as to its invalidity as applied to sales other than "mail order sales".

The two opinions filed in the Supreme Court of Iowa in the case of this respondent jointly decide:

1. That the collection provisions of the Iowa Use Tax Act were intended to apply to all sales made by this respondent and others similarly situated, no matter what the sales medium might be, so long as the merchandise sold was to be used in Iowa.

2. That the collection provisions of the Iowa Use Tax Act were intended to apply to all sales for use in Iowa whether the fact of that use was known to the seller or not. (Section 4 of the Act, which provides that delivery within the state is *prima facie* evidence that the sale is for use in the state, becomes not a limitation, but an added burden.)

3. That the collection provisions of the Iowa Use Tax Act are invalid when applied to many sales which fall within the literal coverage of these provisions.

None of these three findings is before this Court for review, because none of them was challenged by the petition for certiorari or discussed in petitioners' brief.

The petitioners in effect admit that the duty of tax collection cannot be enforced as to all of respondent's sales. They single out for enforcement "mail order sales" only. Such a limitation in construction raises serious questions in itself.

The distinction between "mail order sales" and other sales for use in Iowa has no relation to any possible line of demarcation between a constitutional application of the statute and one which is invalid. The facts earlier outlined show that the only invariable distinction between "mail order sales" and other out-of-state sales is that in the one case orders are received by mail and in the other they are received orally or over the telephone. Certainly no constitutional issue can turn upon so inconsequential a distinction.

Among the many questions to be decided before the result reached by the Iowa Court is rejected is whether the limitation of the challenged provisions to "mail order sales" does not require a legislative rather than a judicial decision, and whether it does not convert a statute of general application into class legislation of doubtful validity.

But the decision of the Iowa Court so clearly follows on other grounds the precedents established by this Court that we have addressed this Brief solely to two propositions:

first, that the challenged provisions are an attempted exercise of power by Iowa over matters which are not within its jurisdiction,

second, that the challenged provisions open the way for the subjection of interstate commerce to multiple burdens arising solely from the interstate character of that commerce.

I. The Application Of The Collection Provisions Of The Iowa Use Tax Act To Any Of Respondent's Sales Included Within The Issues Of This Case Would Amount To An Invalid Regulation Of Transactions Occurring Outside Of The Territorial Boundaries Of The State Of Iowa.

The Supreme Court of Iowa rested its decision upon the ground that the challenged provisions of the Iowa statute operated extraterritorially and were hence invalid:

> "The sales are consummated outside the State of Iowa in each instance. They are separate and distinct from plaintiff's activities in Iowa. The statute here challenged seeks to impose upon plaintiff the obligation that it 'shall at the time of making such sales, whether within or without the state, collect the tax imposed by this chapter from the purchaser'. The sales are made outside of Iowa and the statute requires plaintiff to collect the tax at the time the sales are made. It clearly seeks to regulate activities of

plaintiff outside the state. * * * Under repeated pronouncements of the Supreme Court of the United States, hereinbefore reviewed and quoted from, the State of Iowa has no such right."

292 N. W. at p. 135.

The answer of the petitioner's brief to the position of the Iowa Supreme Court appears to run somewhat as follows:

a. Any argument that the imposition of the duty of collecting a use tax offends against the principle of extraterritoriality is foreclosed by certain decisions of this Court. (See petitioners' brief, pp. 12-16, inc.)

b. The fact that the tax to be collected was laid upon an intrastate activity—use—makes immaterial whatever extraterritorial elements may be present. (See petitioners' brief, pp. 16-21, inc.)

c. The burden of tax collection may be properly laid upon the respondent's exercise of the privilege of doing a retail business in Iowa. (See petitioners' brief, pp. 22-26, inc.)

d. In any event, the respondent's sales for use in Iowa were so connected with intrastate activities as to justify the imposition of the burden of use tax collection. (See petitioners' brief, pp. 26-28, inc.)

For answer to the various arguments of the petitioners which we have just outlined, we propose to show:

a. A state may not impose burdens which in their incidence fall upon activities outside of the state or which are measured by activities which are not directly related to privileges exercised within the state.

b. The challenged provisions of the Iowa Use Tax are clearly within the constitutional prohibitions.

Each of the four points of the argument of petitioners will be answered in the development of these propositions.

The argument of the petitioners consistently obscures one fact which is of great importance to an understanding of the real issues before this Court. Many of the respondent's "mail order sales"—a considerable part of the respondent's "mail order business" with Iowa customers—are outside the issues of this case, since as to them the respondent had reported and collected the tax prior to requesting an injunction against the petitioners.

These "mail order sales" which are outside the issues of the case include

1. sales as to which the respondent's retail stores within the state had some connection;
2. sales solicited by order offices within the state. (R. 49)

After these exclusions, the only sales left are those which were made by out-of-the-state mail order houses and as to which the respondent's agents performed no act within the state of Iowa (R. 32, 38). The issues before this Court relate solely to such sales.

A. A state may not impose burdens which in their incidence fall upon activities outside of the state or which are measured by activities not directly related to privileges exercised within the state.

Stated in a phrase which has been frequently employed, the holding of the Supreme Court of Iowa was that the challenged provisions of the Iowa Use Tax Act are void because they operate extraterritorially. In *Wisconsin v. J. C. Penney Co.* (Dec. 16, 1940), ___ U. S. ___, this court said of the word "extraterritoriality" that it was one of several

> "compendious ways of implying the impotence of state power because state power has nothing on which to operate".

The "impotence" of extraterritorial state laws may be derived, in logic, from either of two distinct considerations of constitutional law. Because the sovereignty of a state is limited to its territory, attempts to exercise sovereignty beyond the territorial boundaries of a state are *ultra vires*. Such was the express holding in *St. Louis* v. *The Wiggins Ferry Co.* (1871) 11 Wall. (U. S.) 423, at pp. 429, 430, 20 L. ed. 192 at p. 194. Furthermore, the equality of each state with its fellow-states within the federal system requires as a necessary implication of the fundamental law of that system that the power of each be excluded from the territories of the others. Such was the reasoning of this Court in such cases as *Ogden* v. *Saunders* (1827) 12 Wheat. 213, at pp. 366 and 369, 6 L. ed. 606, at pp. 658, 659, 660; *Baldwin* v. *Hale* (1864) 1 Wall. (U. S.) 223 at p. 231, 17 L. ed. 531 at p. 533; and *Pennoyer* v. *Neff* (1877) 95 U. S. 714 at p. 722, 24 L. ed. 565 at p. 568.

While the duty of the judiciary to declare extraterritorial legislation invalid derives from either or both of these considerations, it is reinforced by the due process clause of the Fourteenth Amendment, since to act without power is to act without due process.

Before explaining the several reasons why Iowa exceeded its powers in enacting the challenged provisions, a review of some of the recent decisions will show that statutes are "extraterritorial" in character when either:

a. the incidence of the burdens imposed falls upon activities or property located outside the state; or
b. the measure of the burden imposed ostensibly upon the exercise of a privilege within the state is to be found in activities or property outside the state having no direct relation to the value of the privilege granted and exercised.

In *Great Atlantic & Pacific Tea Co. v. Grosjean* (1937) 301 U. S. 412, 57 S. Ct. 772, a tax for the privilege of engaging in retailing through more than one outlet was imposed, measured by the number of stores within the state, but at a rate determined by the total number of units everywhere operated, whether within or without the state. Recognizing the limitations upon state power, this Court said:

> "The state may not tax real property or tangible personal property lying outside her borders; nor may she lay an excise or privilege-tax upon the exercise or enjoyment of a right or privilege in another state derived from the laws of that state and therein exercised and enjoyed."
>
> (301 U. S., at p. 424; 57 S. Ct., at pp. 776-777)

However, the statute in question did not transgress the permissible bounds because:

> "* * * the subject of the tax in question is the prosecution of a defined business activity within the State of Louisiana. * * * The measure of the exaction is the number of units of the chain within the state. * * * The rate of tax for each such unit is fixed by reference to the size of the entire chain. * * * The law rates the privilege enjoyed in Louisiana according to the nature and extent of that privilege in the light of the advantages, the capacity, and the competitive ability of the chain's stores in Louisiana considered not by themselves, as if they constituted the whole organization, but in their setting as integral parts of a much larger organization."
>
> (301 U. S., at pp. 424-425; 57 S. Ct., at p. 777)

The relationship between Louisiana's charge for the privilege actually exercised and the opportunity of exploiting the privilege arising from the total economic strength of the recipient of the privileges was thus a direct one, in the eyes of the majority of this Court. Since the tax was a charge for a privilege actually exercised within Louisiana, and was measured by facts which

bore upon the ability of the recipient of the privilege to exploit it within Louisiana, the legislation was not extraterritorial.

However, in *James* v. *Dravo Contracting Co.* (1937) 302 U. S. 134, 58 S. Ct. 208, this Court had before it a West Virginia tax on gross income from a business part of which consisted of activities outside of that state. This Court said:

> "Unless the activities which are the subject of the tax were carried on within the territorial limits of West Virginia, the state had no jurisdiction to impose the tax."
>
> (302 U. S. at p. 138, 58 S. Ct. at p. 211)

Here the real incidence of the tax, as well as its measure, rested upon extraterritorial activities.

In *Connecticut General Life Ins. Co.* v. *Johnson* (1938) 303 U. S. 77, 58 S. Ct. 436, the appellant was a foreign insurance corporation licensed to do business in California. Outside of that state, it made contracts of reinsurance with other insurance corporations licensed in California covering lives of California residents. The contracts of reinsurance called for performance outside of California. California sought to collect a tax on the premiums paid for the reinsurance. The foreign corporation was exercising a privilege in California. The business of reinsuring California lives received an indirect benefit from the protection given by the State of California to the reinsured lives of California residents. The tax was imposed as part of a general scheme which avoided double burdens by permitting the reinsured company to deduct premiums for reinsurance from gross premiums.

This Court felt, in the first place, that the incidence of the burden of the tax fell upon activities outside the jurisdiction of the state, saying:

"* * * the limits of the state's legislative jurisdiction to tax, prescribed by the Fourteenth Amendment, are to be ascertained by reference to the incidence of the tax upon its objects rather than the ultimate thrust of the economic benefits and burdens of transactions within the state. As a matter of convenience and certainty, and to secure a practically just operation of the constitutional prohibition, we look to the state power to control the objects of the tax as marking the boundaries of the power to lay it. Hence it is that a state which controls *the property and activities within its boundaries* of a foreign corporation admitted to do business there may tax them. But the due process clause denies to the state power to tax or regulate the corporation's property and activities elsewhere."

(303 U. S. at pp. 80, 81, 58 S. Ct. at p. 438—italics added)

The imposition of a burden upon extraterritorial activities could not be justified because the protection which California extended to those whose lives were reinsured and to the company which originally insured them inured to the benefit of the appellant:

"It follows that such a tax, otherwise unconstitutional, is not converted into a valid exaction merely because the corporation enjoys outside the state economic benefits from transactions within it, which the state might but does not tax, or because the state might tax the transactions which the corporation carries on outside the state if it were induced to carry them on within."

(303 U. S. at p. 81, 58 S. Ct. at p. 438)

While the incidence of the burden of the tax upon extraterritorial activities might have sufficed to dispose of the case, this Court also met the argument that the state had the right to impose the burden of the tax upon the privilege actually exercised of doing other business

within California because the reinsurance transactions were

> "so related to business carried on by appellants in California as to be a part of it and properly included in the measure of the tax".
>
> (303 U. S. at p. 80, 58 S. Ct. at p. 438)

The economic benefits derived from the protection of the reinsured lives and of the transactions of writing the original insurance had an economic thrust upon the transactions of reinsurance outside California; but this was not enough. The relationship between the transactions of reinsurance and the privileges actually exercised within the jurisdiction of California was not of a character to sustain the tax:

> "Apart from the facts that appellant was privileged to do business in California, and that the risks reinsured were originally insured against in that state by companies also authorized to do business there, California had no relationship to appellant or to the reinsurance contracts. No act in the course of their formation, performance, or discharge, took place there. The performance of those acts was not dependent upon any privilege or authority granted by it, and California laws afforded to them no protection."
>
> (303 U. S. at p. 81, 58 S. Ct. at p. 438)

Just as California had no power to impose a burden upon activities which occurred outside its borders, so also did California lack the power to burden the privilege which was exercised in California with a burden measured by activities lacking any direct relation to that privilege.

The *Connecticut General* case thus emphasizes the two circumstances under which a state statute may be said to operate extraterritorially: first, when the incidence of the burden falls upon extraterritorial activities; and, second, when the measure of a burden imposed upon an

intrastate activity is determined by extraterritorial activities or values which have no direct relation to the value of the privilege actually burdened.

In *Osborn* v. *Oslin* (1940) 310 U. S. 53, 60 S. Ct. 758, foreign insurance corporations licensed to do business in Virginia challenged a Virginia statute which forbade the making of contracts of insurance by licensed companies except through resident agents who must receive at least half the usual commission. The statute was attacked on the ground that, as related to policies written outside Virginia through non-resident brokers:

> "* * * Virginia is intruding upon business transactions beyond its borders."
>
> (310 U. S. at p. 62, 60 S. Ct. at p. 761)

The court below had made extensive findings. Among them, in the language of the Court, were the following:

> "A policy, whether 'produced' by broker or agent, must be 'serviced'—an insurance term for assistance rendered a customer in minimizing his risk. To this end the companies exert themselves directly. * * * Only to a limited extent can risks be minimized at long range; *local activity is essential.* When the contract is 'produced' by a non-resident broker the 'servicing' function is normally performed by the company exclusively." (Italics added)
>
> (310 U. S. at p. 61, 60 S. Ct. at pp. 760-761)

In other words, unlike the situation involved in the *Connecticut General* case, and in addition to the existence of risks within the protection of Virginia, the contract of insurance wherever consummated contemplated the performance of acts within the state with respect to those risks. Although the contract might be made outside the state through a non-resident broker, "local activity" was "essential", and would usually be "performed by the company exclusively".

As a result, this Court found that:

> "For it is clear that Virginia has a definable interest in the contracts she seeks to regulate and that what she has done is very different from the imposition of conditions upon appellants' privilege of engaging in local business which would bring within the orbit of state powers matters *unrelated to any local interests.*"
>
> (310 U. S. at p. 65, 60 S. Ct. at p. 762) (Italics added)

Here again the nature of the relation between the transactions involved and the "local activities" within the orbit of state power was the subject of inquiry.

Virginia's legislative scheme imposed restrictions upon the conduct of a business rather than upon single acts:

> "This legislation is not to be judged by abstracting an isolated contract written in New York from the organic whole of the insurance business, the effect of that business on Virginia, and Virginia's regulation of it."
>
> (310 U. S. at p. 63, 60 S. Ct. at p. 761)

The regulation of a course of business differs materially from the imposition of burdens directly upon isolated or separable transactions. The *Osborn* case is thus one where the incidence of the burden fell upon a course of business which, while including certain extraterritorial elements such as the making of some contracts, also involved in all cases intrastate or "local activity". The incidence of the burden thus was imposed upon activities over which the state had jurisdiction. Nor could the measure of the burden—the customary charges for insuring property located within the state—be improper since

it directly related to the value of the intrastate privileges actually exercised.[5]

Wisconsin v. *J. C. Penney Co.* (Dec. 16, 1940) ... U. S. ..., also recognizes the major premise of this argument, while holding that the particular facts before the Court did not constitute a proper minor premise. A Wisconsin statute required corporations doing business within that state to pay an additional tax upon the declaration of dividends out of income derived from that state.

This Court first dealt with the holding of the Wisconsin Supreme Court that the burden of the tax fell upon the "privilege of declaring dividends"—a privilege exercised outside Wisconsin. The majority of this Court felt that:

> "The practical operation of this legislation is to impose an additional tax on corporate earnings within Wisconsin but to postpone the liability for this tax until such earnings are paid out in dividends."

Holding that,

> "For constitutional purposes the decisive issue turns on the operating incidence of a challenged tax",

this Court determined to disregard the decision of the Wisconsin court as to the point of incidence, holding that the burden was in reality imposed upon the privilege of engaging in business in Wisconsin, just as if it had been labeled a "supplementary tax on the Wisconsin earnings of such corporations".

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5. The opinion of the three judge district court which this Court affirmed recognized and met the issue of a proper relation between the measure of the burden imposed and the value of the privilege exercised:

> "As it has been shown in the findings of fact that the contracts of the plaintiff companies on persons or property within Virginia call for or contemplate the performance of certain acts within the State, and it follows that the state has power to regulate them, the question is whether the statutory requirement that the insurance contract be made through a resident agent, who shall be paid at least one-half the commissions, has a reasonable relation to the risk covered by the contract and to the performance within the state of the obligation undertaken by the insurer".
>
> Osborne v. Ozlin (D. C., E. D., Va. 1939) 29 Fed. Supp. 71 at 82.

The sole question left was whether the measure of the tax bore a direct relation to the privileges exercised. While the imposition of the burden was postponed until an event outside the state occurred, that event had to do with the disposition of profits derived from the exercise of the very privilege upon which the burden was laid. The measure of the tax involved the profits earned within Wisconsin, and thus was directly related to the privilege burdened.

In distinguishing the *Connecticut General* case, the opinion in the *Penney* case said:

> "In the precise circumstances presented by the record it was found that the tax neither in its measure nor in its incidence was related to California transactions",

while,

> "Here, on the contrary, the incidence of the tax as well as its measure is tied to the earnings which the State of Wisconsin has made possible * * *."

The gist of these decisions is clearly that legislation is extraterritorial in operation when its actual incidence is upon transactions which do not involve the exercise of a privilege within the state, or when it seeks to impose on a privilege exercised within the state a burden measured by transactions outside the state which bear no direct relationship to the value of the privilege burdened.

The decisions of this Court throw some further light upon the relation which must exist between the measure of a burden and the privilege upon which the burden is imposed.

Airway Electric Appliance Corp. v. *Day* (1924) 266 U. S. 71, 45 S. Ct. 12, dealt with a fee charged by Ohio for the privilege of doing business in that state. In declaring

the fee invalid because of its extraterritorial operation, this Court said:

> "The fee determined by the lower court, as well as that fixed by the state officers, is arbitrary. Without holding that such a charge must be measured by the value of the privilege for which it is imposed, it may be said that some relation to such value is a reasonable requirement. * * * The number of shares not subscribed or issued has no relation to the privilege held by plaintiff in Ohio, and it is not a reasonable measure of such a fee."
>
> (266 U. S. at p. 83; 45 S. Ct. at p. 15)

Lawrence v. *State Tax Commission* (1932) 286 U. S. 276, 52 S. Ct. 556, dealt with a Mississippi income tax on a resident of that state measured by total income derived from out-of-state as well as intrastate activities. In upholding the tax, this Court said:

> "The tax, which is apportioned to the ability of the taxpayer to bear it, is founded upon the protection afforded to the recipient of the income by the state, in his person, in his right to receive the income, and in his enjoyment of it when received. These are rights and privileges incident to his domicile in the state and to them the economic interest realized by the receipt of income or represented by the power to control it, bears a direct legal relationship."
>
> (286 U. S. at p. 281, 52 S. Ct. at p. 557)

Finally, the reasoning of this Court in *Wisconsin* v. *J. C. Penney Co.* (Dec. 16, 1940), ... U. S. ..., has provided, in the language of the opinion,

> "a reformulation of the classic approach of this Court to the taxing powers of the state".

Avoiding

> "formulas that are not compelled by the Constitution but merely represent judicial generalizations exceeding the concrete circumstances which they profess to summarize",

this Court pointed out that

> "For constitutional purposes, the decisive issue turns on the operating incidence of a challenged tax".

Consequently,

> "A state is free to pursue its own fiscal policies, unembarrassed by the Constitution, if by the practical operation of a tax the state has exerted its power in relation to opportunities which it has given, to protection which it has afforded, to benefits which it has conferred by the fact of being an orderly, civilized society."

Stated in other words,

> "The simple but controlling question is whether the state has given anything for which it can ask return".

While

> "The fact that a tax is contingent upon events brought to pass without a state does not destroy the nexus between such a tax and transactions within a state for which the tax is an exaction",

the converse must be equally true: the burden must be a charge for the protection extended "transactions within a state", and some "nexus" must exist between the events upon which the charge is conditioned or by which the amount of the charge is measured and the protection or benefits extended by the state.

This nexus or relation between the measure of a charge or exaction and the intrastate privilege upon which it is laid involves of necessity the existence of some relation between the charge and the value of the privilege granted and exercised. Only then can it be said that the state has given something for which it is asking a return.

This is the gist of the constitutional prohibition against extraterritorial state laws. We propose now to show that the prohibition applies under the "concrete circumstances" of the case at bar.

B. The burden imposed by the collection provisions of the Iowa Use Tax Act as applied to those of respondent's "mail order sales" embraced within the issues of the case at bar falls directly upon transactions and activities outside the territorial boundaries of the State of Iowa.

The petitioners nowhere take a definite position as to what privilege within the "control" of Iowa they regard as regulated or burdened, nor as to what the relation between the burden imposed and the privilege burdened may be. Instead, the petitioners at one time or another adopt three different and mutually inconsistent theories as to what activity within Iowa is burdened:

1. the use within Iowa, which is the incidence of the tax itself;[6]

2. the exercise of the privilege of doing a retail business within the State of Iowa;[7]

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6. Petitioners speak of the use tax as
"conditioned upon an event occurring within the State of Iowa, namely, Use"
(Petitioners' brief, pp. 16 and 30)
and argue as if the event of use within the state is the peg upon which the whole statute depends, saying:
"* * * under the Iowa law, the use or exercise of ownership in Iowa is the only activity taxable. It is sufficient if this activity occurs within the borders of the State. If it does, then the seller within the jurisdiction of the State must accept the burden * * * to collect the tax * * *."
(Petitioners' brief, p. 20)
Later petitioners reiterate this theory:
"Clearly, under the sales and use tax laws we need look no further than the intrastate activities which are the incidence of the tax. Once these are present, namely, use in Iowa or sale in Iowa, then the events in the transactions leading up to the incidence are all immaterial."
(Petitioners' brief, p. 21)

7. In between the passages quoted in the preceding footnote, petitioners quote a different theory from the dissenting opinion of Chief Justice Hamilton in the Iowa Supreme Court:
"Contra, the tax is laid on the privilege of use within the state, and the incidental burden of collecting the tax is upon the privi-

3. the supposed performance of acts associated with the making of mail order sales and forming with them a course of business at least partly intrastate.[8]

We propose to show that a realistic analysis of the challenged provisions and of the record discloses that the burden of tax collection actually falls upon the activity of making sales for use in Iowa and that this activity of the respondent takes place wholly outside Iowa with respect to all the sales included within the issues.

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lege granted by the state to appellee—a privilege actually made use of—to engage in the retail business within the state."
(See petitioners' brief, p. 21)

This second theory is later expounded by the petitioners:

"Rather, the State is imposing a duty upon the plaintiff to act as its agent in collecting certain taxes due it from citizens of the State of Iowa by virtue of privileges exercised and enoyed by the plaintiff within the State of Iowa, to wit, the privilege of engaging in the retail business within the State of Iowa."
(Petitioners' brief, p. 23)

A still further exposition of this theory is found later in petitioners' brief:

"This burden of collecting the tax, even if it be called a tax to be paid by the seller is not a tax upon the sale as such, but if it be called a tax, it is a license tax measured it is true by the number and amounts of sales, but it does not lose its character of a license tax or regulation imposed upon the seller in return for the privilege of doing business in the State of Iowa."
(Petitioners' brief, p. 26)

8. A third theory is advanced at another point:
" * * in any event in these mail order sales there is a good deal of intrastate activity by the mail order house."
(Petitioners' brief, p. 26)

What is meant is not that the sales involve intrastate activity, but that the sales are the result of, or associated with, or are a part of a course of business involving, intrastate activity. This is made clear by a later sentence:

"There are, of course, other obvious activities that would likely attend any business of selling, such as adjustments, credit inquiries and collection procedure."
(Petitioners' brief, pp. 27-28—emphasis added)

1. The Supreme Court of Iowa has interpreted the Iowa statute as imposing the burden of tax collection upon the activity of making sales.

The Iowa Supreme Court said:

> "The statute here challenged seeks to impose upon plaintiff the obligation that it 'shall at the time of making such sales, whether within or without the state, collect the tax imposed by this chapter from the purchaser'. The sales are made outside of Iowa and the statute requires plaintiff to collect the tax at the time the sales are made. It clearly seeks to regulate activities of plaintiff outside the state."
>
> (292 N. W. at p. 135)

The Supreme Court of Iowa thus interpreted the challenged statute as imposing the burden of tax collection upon the specific activity of "making sales". While not conclusive upon this Court in the determination of questions of constitutional power, this interpretation of a state statute by the highest court of that state is naturally entitled to great weight.

In *Wisconsin* v. *J. C. Penney Co.* (Dec. 16, 1940), ... U. S. ...., where this Court refused to accept the "descriptive pigeon-hole" into which the Wisconsin Court had placed the challenged tax, this Court did so because, quoting from *Henderson* v. *Mayor of New York* (1876) 92 U. S. 259 at p. 268, 23 L. ed. 543, at p. 547:

> " 'In whatever language a statute may be framed, its purpose must be determined by its natural and reasonable effect' ".

In the case at bar, the Iowa Court's interpretation of the incidence of the burden of tax collection only recognizes, as we shall show, the "natural and reasonable effect" of the operation of the statute.

2. The challenged provisions of the Iowa statute by their explicit terms impose the burden of collection upon the specific act of making sales.

The interpretation which the Supreme Court of Iowa gave to the challenged provisions was, in truth, the obvious and the only one. The language of those provisions is neither ambiguous nor obscure. Section 8 provides that retailers subject to it and "making sales" for use in Iowa:

> "shall at the time of making such sales, *whether within or without the state,* collect the tax. * * *"
>
> (Italics added—Section 6943.109 of the Code of Iowa, 1939)

The duty of collection must, by the explicit terms of the statute, be performed *at the time* the sale is made. As the Supreme Court of Iowa pointed out:

> "Under the facts herein, the property is then without the state."
>
> (292 N. W. at p. 132)

Since the tax must be collected before the property is sent to Iowa, it must be collected before the use in Iowa takes place. It must, in fact, be collected at the seller's risk even in the absence of knowledge of an intended use in Iowa. This, as has already been pointed out, was the holding of the Supreme Court of Iowa. A shipment from St. Paul of merchandise to an Iowa customer consigned to a freight point just across the border in Minnesota might still be a sale for use in Iowa and the occasion for the performance of the duty of tax collection.

Since the act of tax collection must under the statute be performed *at the time* the sale is made, the making of the sale is the event upon which the duty is conditioned. Hence the explicit language of the challenged provisions imposes the burden upon the making of sales even when, as in the present case, those sales were made outside of the State of Iowa.

3. The actual economic incidence of the burden of tax collection, as separate and distinct from the burden of the tax itself, does in fact fall upon the activity of making sales and not upon such other activities as that of use by the customers within the state.

Two separate and distinct burdens are imposed by the Iowa Use Tax Act. One is the burden of the tax itself; the other is the burden of acting as a tax collector for the state. Since the validity of the tax itself is not involved, we are not here concerned with the first burden.

An appreciation of the fact that this second burden is a substantial and costly one, and separate and distinct from the burden of the tax itself, is necessary to a correct understanding of the real issues. Once this is realized, an examination of the statute shows that the Supreme Court of Iowa correctly identified the point of incidence of the burden.

a. The burden of acting as a tax collector under an obligation to make the state whole for any tax not in fact collected has been recognised by this Court as a substantial one.

Section 11 of the Iowa Use Tax Act provides:

> "The tax herein required to be collected by any retailer pursuant to sections eight or nine hereof, and any tax collected by any retailer pursuant to said sections, shall constitute a debt owed by the retailer to this state."
>
> (Section 6943.112 of the Code of Iowa, 1939)

The practical result of this section is to impose a burden which is the economic equivalent of the tax itself, and the Supreme Court of Iowa so recognized it:

> "Defendants contend that the tax is a tax upon the use of property in this state, is really a tax upon the purchaser and is not a tax upon the plaintiff at all.

> Perhaps from a subtle and technical standpoint this may be true, but, if true, it is unimportant. * * * From any reasonable or practical standpoint, the amount of the tax being made a debt of plaintiff, the statute at least constitutes regulation of plaintiff's activities outside the state as a condition to it being granted a license to do business in the state."
>
> (292 N. W. at p. 132)

This Court has held that the imposition of the burden of acting as a tax collector for the state may in itself amount to the burdening of extraterritorial activities. In *Railroad Co.* v. *Jackson* (1869) 7 Wall. (U. S.) 262, 19 L. ed. 88, the railroad company, a corporation of both Pennsylvania and Maryland, complied with a Pennsylvania law by withholding a tax from interest due Jackson, a bondholder not resident within Pennsylvania. Jackson sued the railroad company, and this Court held the deduction improper. The result in the *Jackson* case was approved and followed in the case of the *State Tax on Foreign-held Bonds* (1873) 15 Wall. (U. S.) 300, 21 L. ed. 179.

In *New York, Lake Erie, and W. R. Co.* v. *Pennsylvania* (1894) 153 U. S. 628, 14 S. Ct. 952, another Pennsylvania statute was before the court. Whereas in the two previous cases, the corporation was a creature of the laws of Pennsylvania, and the bondholder was a non-resident, the facts before this Court in the *Lake Erie* case were the converse. The corporation was a foreign one, holding only a license to do business in Pennsylvania, and the bondholder was a resident. The interest from which the deduction was ordered was, however, payable in New York. While in both cases the corporation was acting as a collector for the state, the collection in the *Lake Erie* case was of a tax on intangible property which was, through the residence of the owner, within the jurisdiction of Pennsylvania.

The case thus parallels closely the situation now before this Court. The state had power to levy the tax in both cases; and the corporation in both cases was amenable to the process of the state. In both cases the corporation enjoyed privileges granted by the state.

This Court said in the *Lake Erie* case:

> "The money in the hands of the company in New York, to be by it applied in the payment of interest, which by the terms of the contract is payable in New York, and not elsewhere, is property beyond the jurisdiction of Pennsylvania, and Pennsylvania is without power to say how the corporation holding such money in another state shall apply it, * * * No principle is better settled than that the power of a state, even its power of taxation, in respect to property, is limited to such as is within its jurisdiction."
>
> (153 U. S. at p. 646, 14 S. Ct. at p. 958)

The clear applicability of the *Lake Erie* case to the facts of the present case is emphasized by the following passage:

> "It (the Pa. Statute) assumes to do what the state has no authority to do,—to compel a foreign corporation to act, in the state of its creation, as an assessor and collector of taxes due in Pennsylvania from residents of Pennsylvania."
>
> (153 U. S. at p. 645, 14 S. Ct. at p. 958)

Thus the *Lake Erie* case is one which clearly recognizes that the burden of acting as a tax collector with respect to a valid tax may be in itself invalid because it relates to extraterritorial activities exclusively.

The substantiality of the burden of insuring the collection of taxes, especially as applied to the sales of this respondent which are embraced within the issues, is independently established by undisputed testimony that the most efficient methods of collection possible in respond-

ent's business would still leave nearly 15% of the tax uncollected and payable out of the funds of the respondent. (R. 45)

b. The burden of tax collection is economically substantial apart from the liability for any uncollected portion of the tax itself.

In addition to the burden of making the state whole as to any tax it could not in fact collect, the challenged provisions would impose other burdens of a substantial character upon the respondent. The undisputed evidence was that it would cost the respondent, over and above the cost of making good the inevitable deficit in tax collections, a sum ranging from $890 to $1040 for every $10,000 of tax liability. (R. 46-47)

This evidence was not controverted, and a reading of it will demonstrate how obviously the duty of tax collection increases costs and burdens the operation of a business.

c. The incidence of the burden of tax collection does not fall upon the activity of use within Iowa, but increases the expense of, and decreases the net profit from, the activity of making sales.

One theory advanced by the petitioners, as we have seen, is that:

> "The Use Tax is conditioned upon an event occurring within the State of Iowa, namely, Use, and it is immaterial if the order was the result of personal solicitation or the approval of the order an extra-state activity."
>
> (Petitioners' brief, p. 16)

The conditioning of the tax upon an event occurring within Iowa, namely, "use", undoubtedly saves the tax itself from the charge of burdening an extraterritorial act. But

the duty of collection is, to use the petitioners' phrase, "conditioned upon an event" occurring outside the State of Iowa, namely, "the making of a sale".

Certainly jurisdiction over the activities of a customer does not in itself confer jurisdiction over the activities of a seller. If this be the case, every sale by the respondent for use in Iowa would involve the duty of collection even though the customer be on a motor trip to California and his purchase be made from one of respondent's California retail stores. The argument is akin to that rejected by this Court in *Connecticut General Life Ins. Co.* v. *Johnson* (1938) 303 U. S. 77, 58 S. Ct. 436, discussed above, where the other party to the transaction of reinsurance had solicited the original insurance in California.

This argument of petitioners therefore has meaning only if it be predicated on an assumption that the economic burden of tax collection is also shifted in fact to the user. This assumption is rebutted by the record.

The record contains testimony as to competition between the respondent and other mail order houses which do not maintain places of business within Iowa and hence are not burdened with the duty of tax collection. The record further shows that, as a result of this and other factors, the economic incidence of the cost of tax collection to the respondent cannot be shifted to purchasers in Iowa. (R. 35, 36)

The argument that the economic burden of the tax is upon the user, and hence that the seller should not complain about collecting it, loses its plausibility when the record is examined and the substantiality of the burden imposed by the duty of the tax collection is appreciated. The assumption that all taxes bear eventually only upon the consumer may have an element of speculative truth

in it, but the glib assumption that the retailer thereby escapes unscathed is too superficial to merit debate before this Court. The record in the present case shows clearly how, in a competitive economy, the duty of collecting taxes may involve heavy expenses which cannot be passed on and must be absorbed by the retailer himself.

4. The activity of making the sales embraced within the issues of the present case occurred outside Iowa.

This fact, which the record clearly proves, is apparently not disputed, for the petitioners in their "Statement of the Case" say:

> "* * * the Iowa customers send orders by mail to such mail order stores located outside of Iowa *and the orders are there filled* and the merchandise shipped to the purchasers in Iowa."
>
> (Petitioners' brief, p. 3)

Indeed, none of the three theories which the petitioners advance as to the intrastate activity to which the jurisdiction of the state attaches assumes that the sales before this Court were made in Iowa.

This is not a case where the act of making a sale is defined for purposes of the statute as including other elements than the actual transfer of title. The term "sale" is not specifically defined in the Iowa Use Tax Act, and hence must be taken in its ordinary and accepted meaning. Even the Iowa Sales Tax Act, which petitioners treat as a related statute, defines a sale merely as

> "any transfer, exchange, or barter, conditional or otherwise, in any manner or by any means whatsoever, for a consideration."
>
> (Par. "b", Section 6943.074 of the Code of Iowa, 1939)

The undisputed evidence shows that the respondent's ordinary mail order sales are made as follows:

"They (customers) select the merchandise, prepare an order for it, usually on an order blank that is provided in the catalog, specify the article, number, description and price and send the order with remittance to the mail order house. The remittance being for the cost of the merchandise and the transportation."

(R. 29)

"Generally the customers followed the instructions in the book in sending in their orders."

(R. 31)

"The customer designates the method of transportation and he either remits at the time of the order or the order is sent C. O. D. or the Company extends credit."

(R. 31 and 32)

"Some orders are not filled for the reason that we do not have the merchandise in stock or the customer fails to give specifications as to size or color, etc."

(R. 32)

"No employee of the mail order house lives within the State of Iowa, and there are no acts done within the State of Iowa in regard to any of the orders sent to the mail order house."

(R. 38)

These facts clearly establish that the respondent's "mail order sales" are made and consummated at the various mail order houses by acceptance of customers' orders, appropriation of merchandise and delivery to a common carrier selected by the customer, shipment being at the cost of the customer.

Such was the finding of the Iowa Supreme Court, which said:

"Section 6943-109 requires that the tax be collected when the sale is made. Under the facts herein, the property is then without the state."

(292 N. W. at p. 132)

And again:

> "The mail order sales, however, do not constitute activities within the State of Iowa, nor do such sales constitute doing business within the state. *The sales are consummated outside the State of Iowa in each instance.*"
>
> (292 N. W. at p. 135)

The fact that the "mail order sales" which are in issue were "made" outside the State of Iowa is thus demonstrated by the record, admitted by the petitioners, and found by the Supreme Court of Iowa.

5. The entire activity which included making the sales embraced within the issues of the present case is dissociated from the exercise of any privilege granted the respondent by Iowa.

While the incidence of the burden of tax collection clearly falls upon the transactions of making sales, and these transactions are outside Iowa, the completely extraterritorial character of the challenged provisions is emphasized by the fact that the whole course of business of which these transactions form a part is conducted outside Iowa. As the Supreme Court of Iowa said:

> "If the plaintiff limited its activities to conducting a mail order business such as shown by the record herein, it would not be doing business in this state and the state could not require it to secure a license to do business here."
>
> (292 N. W. 130 at p. 132)

What the Iowa court had in mind was clearly the absence of any intrastate elements in the business in question.

Beginning at p. 26 of petitioners' brief is a discussion headed:

> "If intrastate activity in connection with the sale for use in Iowa be thought necessary, then such activity is present in this case."

After stating that:

> "• • • In these mail order sales there is a good deal of intrastate activity by the mail order house." (Petitioners' brief, p. 26)

petitioners rely upon a passage from the dissenting opinion of Chief Justice Hamilton in the Iowa Supreme Court as "enumerating" the intrastate activities of the mail order houses.

An analysis of this passage shows that the argument of petitioners depends in each instance upon one or the other of three fallacies:

a. the gratuitous assumption of facts which are in most cases specifically rebutted by the record;
b. the failure to distinguish between conduct taking place in Iowa and the effect within Iowa of conduct taking place elsewhere.
c. the failure to distinguish between jurisdiction over the activity of one party to a transaction and jurisdiction over the activity of the other.

The passage quoted from the dissenting opinion refers to these supposed intrastate activities:

a. "the activity of the retailer • • • soliciting business from Iowa residents by means of distribution of • • • catalogues."
b. "The activity of the purchaser within the State of Iowa • • • (in) making out the order, enclosing the purchase price, the carrying charge (and the requisite tax, if the law was obeyed), and placing the order in the mail. • • • "
c. "The activity of the purchaser within the State of Iowa • • • after receipt of the goods, making use of them."
d. "The use of the express company or the United States mail instead of its own motor trucks" in the respondent's distribution of catalogs.

e. "making adjustments in case of damaged, soiled, misfit or defective merchandise, or * * * the exchange of the merchandise * * * which might require, in the adjustment, return of a portion of the purchase price paid."

f. "credit or installment business (which) might even require court action to repossess the property."

(See quotation in petitioners' brief, p. 27)

To this list may possibly be added the additional element which the petitioners have erroneously assumed as concomitant with all "mail order sales";

g. shipment of merchandise to purchasers in Iowa.

(See petitioners' brief, p. 3)

Before specifically examining the several items of this list, one point may well be mentioned. While a foreign corporation may own property within a state, and this property is consequently within the jurisdiction of the state, all questions of state jurisdiction which do not relate to such property depend upon the existence of *activities* within the state by *agents* or *employees* of such foreign corporation. This is because of the incorporeal character of a corporation, which prevents a state from basing jurisdiction upon the physical presence of a corporation in the same manner as it may base jurisdiction for appropriate purposes on the physical presence of an individual within the state.

> "The case is unlike that of suits against individuals. They can act by themselves, and upon them process can be directly served, but a corporation can only act and be reached through agents."
>
> (*St. Clair* v. *Cox* (1882) 106 U. S. 350, at p. 356, 1 S. Ct. 354, at p. 359)

Since a state's jurisdiction over foreign corporations for all purposes not satisfied by the mere ownership of property within a state depends upon activities of a corpora-

tion performed through its agents within the state, the question of the state's jurisdiction over such activities depends upon identical considerations.

a. The activities of purchasers from respondent do not give jurisdiction to the State of Iowa.

In the list above, items "b" and "c" are activities of the purchaser and not of the respondent. Obviously activities such as use within Iowa by purchasers from respondent do not require the exercise by the respondent of a privilege granted by Iowa.

Iowa extends protection to its citizens, and all businesses within the confines of the United States, wherever conducted, will to a greater or less extent, profit from the economic well-being of such an important segment of the national life. But the several states cannot, by such a circumstance, extend their powers to exact a contribution from all who may in some indirect fashion benefit from the protection which the state has provided for its own citizens.

The test is whether the one upon whom the charge is placed has received the "protection, opportunities, and benefits given by the state" (*Wisconsin* v. *J. C. Penney Co.* (Dec. 16, 1940) .... U. S. ..... The act of making out an order in Iowa or of using merchandise in Iowa receives the protection of Iowa; but the protection is extended to the citizen of Iowa who is charged for the privilege by the imposition of a use tax. The indirect benefits which the mail order company receives are primarily due to the "protection, opportunities, and benefits given by the state" in which the mail order house is located. The situation changes only when the agents of the respondent, in the handling of the business of making such sales, perform acts which receive the "protection, opportunities, and benefits" extended by Iowa.

In *Connecticut General Life Ins. Co.* v. *Johnson* (1938) 303 U. S. 77, 58 S. Ct. 436, the fact that the companies which dealt with the appellant had acted in California in securing the insurance reinsured by appellant was held not to bring the activity of reinsurance within the jurisdiction of California. This Court pointed out that the fact that the other party to a transaction may be engaged on his part in an intrastate activity no more than demonstrates the "ultimate thrust of the economic benefits and burdens of transactions within the state" beyond the boundaries of the state.

b. The assumption that intrastate activities take place when no showing as to them is made does not give jurisdiction to Iowa, especially when the record specifically rebuts the existence of them.

Items "e" and "f" on the petitioners' list of supposed intrastate activities are purely speculative. The record contains these uncontroverted statements:

> "No employee of the mail order house lives within the State of Iowa and there are no acts done within the State of Iowa in regard to any of the orders sent to the mail order house. The company has no means of collecting any amounts or sums, or any machinery presently set up for collecting any sums from Iowa customers by individuals within the State of Iowa, * * *."
>
> (R. 38)[9]

The several catalogs introduced into evidence contain the following instruction to customers describing the manner in which adjustments are handled:

> "* * * Whatever you buy from us must please you in every way * * * or you may return it and we will

9. Even if credit sales contemplated the performance of acts of collection within Iowa, they could be separated and the collection provisions separably applied, since credit sales amount to only 18% of the mail order business (R. 40).

either exchange it for what you want or refund all you paid, including transportation charges both ways."

(See p. 6, Exhibits B, C, and D, and similar language at p. 7, Exhibits E, F, and G)

The catalogs contain further instructions concerning returned merchandise, which clearly establish that adjustments are made by mail at the mail order house, and that agents are not sent into the State of Iowa for this purpose.

c. The fact that respondent's activities may have economic repercussions in Iowa does not bring them within the jurisdiction of Iowa.

The remaining items of supposed intrastate activity are all examples, not of acts performed within Iowa, but of the economic effects in Iowa of acts performed outside of Iowa.

The supposed "solicitation" of mail order sales by the presence of catalogs in Iowa is a case in point. Petitioners argue:

"The activity of soliciting sales cannot be a question of degree. We only argue that there is evidence of solicitation for orders on the part of the mail order house. This is the only conceivable distinguishing characteristic between the mail order sale and the sale in the *Felt & Tarrant* case. That this activity of soliciting of orders by the catalog method is effective is amply demonstrated by the volume of mail order business done."

(Petitioners' brief, p. 27)

Here petitioners treat the presence in Iowa of respondent's catalogs as if it were the equivalent of acts of personal solicitation of business. Similarly, Chief Justice Hamilton said:

"* * * by this means appellee displays its merchandise, its prices, and gives its sales talk to Iowa customers. * * *"

(292 N. W. at p. 139)

But the distribution of catalogs in Iowa in fact involves no act of the respondent and its agents within the State of Iowa. The catalogs are all printed in Chicago (R. 93, 95), distributed by mail to Iowa customers (R. 40) "from the three mail order houses" (R. 86) which serve the state. No title to the catalogs is reserved in the respondent (see the several catalogs introduced as exhibits); and like all advertising material they become the property of the customer to do with as he chooses. The State of Iowa extends no protection to the respondent in the performance of any act with respect to them; nor does it even protect any property of the respondent.

Certainly, the acts of employees of the United States Government in carrying catalogs through the mails are not acts of the respondent receiving the protection of the State of Iowa.

The presence of catalogs in Iowa as a result of the acts of mailing them performed by respondent's agents outside of Iowa produces economic results; but the effect of the presence of those catalogs is not the legal equivalent of the presence of agents of the respondent soliciting sales while receiving the protection of the state.

Certainly if the economic repercussions of activities within the state upon transactions outside the state do not bring those latter transactions within the jurisdiction of the state (see, as already pointed out, *Connecticut General Life Ins. Co.* v. *Johnson*, (1938) 303 U. S. 77, 58 S. Ct. 436), the converse must be equally true. In these days of complex economic life, the effect of any activity

may transcend state boundaries; but our political organization would break down if every state could exercise jurisdiction as broad as the repercussions arising from the interaction of economic activity within it with economic activity elsewhere.

C. The measure of the burden imposed by the challenged provisions of the Iowa Use Tax Act has no proper relation to the value of any privilege granted the respondent by Iowa.

What has been said demonstrates, we submit, that the challenged provisions of the Iowa Use Tax Act are extraterritorial in operation because they impose burdens directly upon activities performed entirely outside Iowa.

Petitioners argue at one point, however, that the duty of tax collection is a burden placed upon the privilege of doing a retail business in Iowa. The theory is variously stated. The dissenting opinion of Justice Mitchell in the Iowa Supreme Court rested entirely on the statement that the burden of tax collection was not "unreasonable" and hence could be made a condition precedent to the "grant" of "the privilege of doing business in Iowa". (292 N. W. at p. 137) The dissenting opinion of Chief Justice Hamilton expresses the same thought in somewhat different language:

> "In the instant case, Iowa has granted the appellee two privileges: (1) the privilege of doing business as a foreign corporation, and (2) the privilege of operating a retail merchandising business within the state. These privileges granted furnish a * * * substantial basis for upholding and sustaining the burden imposed. * * *"
>
> (292 N. W. at p. 139)

The petitioners' brief contains a division headed:

> "The power to impose the duty of collecting the tax upon the seller in consideration of the grant of privilege to the seller to engage in the retail business in Iowa is not prohibited by the due process clause * * *."
>
> (Petitioners' brief, p. 22)

The adoption of this argument would require this Court to disregard the decision below, the plain language of the statute, and the economic facts which show that the burden of tax collection adds to the cost of making sales outside the state and falls solely upon activities which involve the exercise of no privileges granted by Iowa.

But even should this Court decide, as in *Wisconsin* v. *J. C. Penney Co., supra,* that the "operating incidence" actually fell upon the doing of business in Iowa, no argument so far advanced by the petitioners has shown any relation between the measure of the burden imposed and the privilege of doing business in Iowa. No such relation in fact exists, even in a speculative sense.

The burden of tax collection is measured by the amount of sales made outside the state for use in Iowa. This measure has no relation whatsoever to the value of the privilege of doing business in Iowa.

No showing is made in the record as to the comparative volume of the mail order sales to Iowa customers and the retail sales made within Iowa. No showing is made that the volume of mail order business with Iowa customers increases in any way the amount of retail business done within the state or the profit in that business. The record contains undisputed evidence that no such relation does in fact exist.

Only 25% of the merchandise carried by the respondent's retail stores in Iowa is duplicated identically in the

mail order houses (R. 27); conversely only about 2% of the mail order merchandise is duplicated identically in the retail stores (R. 27). In other words, the existence of the retail stores in Iowa could not improve the buying power of the mail order houses except with reference to 2% of the mail order merchandise; and the small number of Iowa retail stores (29—R. 27) against the total operated by the respondent (598—R. 36) means that the economic effect, if any, of the operation of retail stores in Iowa on the mail order business would be infinitesimal.

The respondent's retail business is operated by a different organization and personnel from the mail order business (R. 38). Separate bookkeeping is employed for the two branches (R. 28). The mail order business competes in securing Iowa business with other similar companies which are not licensed in Iowa and hence are not covered by the Iowa Use Tax Act (R. 35, 36). The respondent conducted a mail order business with Iowa customers for many years before operating any retail stores in Iowa (R. 27, 28, and 85). Its store operations in Iowa were handled by a separate and subsidiary corporation for six years after the opening of the first Iowa retail store (R. 28 and 39). The prices of merchandise in the retail stores are generally higher than prices of mail order merchandise, because "retail service is more expensive than mail order service" (R. 42). The retail stores in Iowa were not intended to act as a leader and enlarger for the mail order business (R. 95).

Nor in the face of these facts could the volume of mail order business with Iowa customers be said to affect the amount of retail store sales within Iowa. Only 2% of the merchandise sold by mail orders duplicates retail store merchandise and could contribute to future sales of retail merchandise by educating Iowa customers in its use. The

differences in merchandise, in price, and in buying habits involved in the two types of selling negatives the existence of a reciprocal relation. On the contrary, the lower mail order prices might indeed tend to divert business from the stores and to decrease the value of the privilege of operating the stores.

Nor can it be argued that the retail stores in Iowa are necessarily benefited by the purchasing power generated by mail order sales to Iowa customers. The dissimilarity in merchandise sold negatives such an inference; furthermore, the respondent's purchasing power would be a product of its total business which might decrease at the same time its mail order sales to Iowa customers increased.

At the one point where the two businesses do in fact overlap—the mail order sales solicited by retail stores—the tax has been collected and paid.

All of these facts tend to show that the mail order business is not dependent in any way, for profits or for its existence, upon the exercise of privileges granted by the State of Iowa and that the retail business conducted in Iowa is equally independent of the mail order business.

The lack of relation between the "mail order sales" for use in Iowa and the privilege of making retail sales in Iowa is emphasized by the fact that in every way the connection between out-of-the-state retail sales, not covered by the statute if construed in accordance with petitioners' request, and the intrastate business of the respondent is closer than the relation of the mail order sales. The similarity of merchandise, prices and selling practices might create a remote relation between the amount of such sales and the value of the privilege exercised in Iowa. Other retailers in competition with the respondent—the ten cent store chains, the hardware chains, and the department chains,—might make out-of-

state sales to Iowa customers; no added burden would be laid on the privilege they exercise despite the identity of type of sale. But this respondent, who happened to make sales by mail less comparable with its normal business would be heavily burdened in consequence. This element of arbitrariness emphasizes the lack of a proper relation.

The petitioners cite a number of cases in support of their theory that the burden may be upheld as imposed on the privilege of doing a retail business in Iowa. These decisions in fact tend to emphasize the impropriety of petitioners' suggestion.

The first case (also cited in the dissent of Justice Mitchell in the Iowa Supreme Court) is *Ford Motor Co.* v. *Beauchamp* (1939) 308 U. S. 331, 60 S. Ct. 273. This case involved a "charge * * * for the opportunity to transact" an "intrastate business", and the Court said:

> "In laying a local privilege tax, the state sovereignty may place a charge upon that privilege for the protection afforded. When that charge, as here, is based upon the proportion of the capital employed in Texas, calculated by the percentage of sales which are within the state, no provision of the Federal Constitution is violated."
>
> (308 U. S. at p. 335; 60 S. Ct. at p. 275)

The only extraterritorial aspect was the effect of property outside the state upon the taxing formula. This Court said:

> "The weight, in determining the value of the intrastate privilege, given the property beyond the state boundaries is but a recognition of the very real effect its existence has upon the value of the privilege granted within the taxing state."
>
> (308 U. S. at p. 336, 60 S. Ct. at p. 276)

The relation between the measure of the privilege and the value of the privilege was too obvious to require much discussion. The need for such a relation is emphasized by the insistence upon it.

The second case cited by petitioners in support of their theory is *Great Atlantic & Pacific Tea Co.* v. *Grosjean* (1937) 301 U. S. 412, 57 S. Ct. 524. As elsewhere pointed out, this case was decided on the ground that the measure of the tax imposed bore a direct relation to the value of the opportunity extended the appellant in exploiting the license granted it by Louisiana. Such a relation does not exist in the present case.

The third of petitioners' citations is *Equitable Life Assur. Soc.* v. *Pennsylvania* (1915) 238 U. S. 143, 35 S. Ct. 829, where premiums on Pennsylvania lives, including those paid by mail to a point outside the state, were taken as the measure in levying a charge upon the privilege of doing an insurance business within Pennsylvania. This Court said:

> "The tax is a tax upon a privilege actually used. The only question concerns the mode of measuring the tax."
>
> (238 U. S. at p. 147, 35 S. Ct. at p. 830)

The incidence of the tax was clearly upon an intrastate activity; the problem was solely the relation between the measure employed and the value of the privilege exercised:

> "As to that a certain latitude must be allowed. It is obvious that many incidents of the contract are likely to be attended to in Pennsylvania, such as payment of dividends when received in cash, sending an adjuster into the state in case of dispute, or making proof of death. * * * It is not unnatural to take the policy holders residing in the state as a measure without going into nicer, if not impracticable, details."
>
> (238 U. S. at p. 147, 35 S. Ct. at p. 830)

In other words, the relation was found in the fact that the contracts of insurance (which may have been solicited within Pennsylvania) contemplated activity within that

state although premiums under them were paid outside the state; and this activity was embraced within, and consequently enhanced the value of, the privilege exercised within the state.

The fourth and last case cited by the petitioners is *Compania General de Tabacos* v. *Collector* (1927) 275 U. S. 87, 48 S. Ct. 100. A tax upon premiums paid outside the taxing jurisdiction by an insured who performed within the taxing jurisdiction acts leading to the contracts of insurance might, as the dissent in that case pointed out, have been based on the jurisdiction over those activities. However, the majority found that

> "* * * this tax placed upon the assured must ultimately be paid by the insurer, and treating its real incidence as such, the question arises whether making *and carrying out* the policy does not involve an exercise or use of the right of the London Company to do business in the Philippine Islands under its license, because the policy covers fire risks on property within the Philippine Islands which may require adjustment *and the activities of agents in the Philippine Islands* with respect to settlement of losses arising thereunder. This we think must be answered affirmatively under *Equitable Life Soc.* v. *Commonwealth of Pennsylvania*. The case is a close one. * * *"
>
> (275 U. S. at p. 98; 48 S. Ct. at p. 104—italics added)

The *Equitable Life Assurance Soc.* case, the *General de Tabacos* case, and *Osborn* v. *Ozlin*, discussed earlier, all are predicated on the local and intrastate activity assumed or proven to be associated with an insurance contract on lives or property within the State. Such activity was more or less assumed in the first two; in the last, this Court relied on actual proof.

In the *Connecticut General* case, no such assumption was made, nor would it have been reasonable. In the present case, the assumption would be both unreasonable and opposed to the uncontradicted evidence. The grounds upon which a relation was assumed in the *General de Tabacos* case were doubted by the court; in the present case not even a doubtful guess can in honesty be hazarded.

D. None of the cases cited by petitioners supports the validity of the collection provisions of the Iowa Use Tax Act as applied to the facts before the Court.

In the course of their argument, petitioners cite a number of decisions in support of their general proposition that the challenged provisions "do not amount to extraterritorial operation of the Iowa law". Many of these decisions have already been discussed and shown to support the argument of the respondent. So that the position of the respondent may be entirely clear, we propose to discuss the rest of them briefly.

a. *Henneford* v. *Silas Mason Co.* (1937) 300 U. S. 577, 57 S. Ct. 524.

This case involved simply the validity of use taxes themselves, when payable by the user. No argument as to extraterritoriality was or could be made. The measure of the tax was the purchase price, which may have been determined in extrastate transactions; but this is so clearly a measure of the value of the privilege of use that the necessary relation between the measure of the charge and the value of the privilege required no demonstration.

b. *The New York City sales tax cases.*

The petitioners devote more time to a discussion of four cases decided by this Court involving the validity of a so-called "sales tax" imposed by New York City than

to any other decisions (see petitioners' brief, pp. 16-21 inclusive):

McGoldrick v. *Berwind-White Coal Mining Co.* (1940) 309 U. S. 33, 60 S. Ct. 388.

Jagels "c[illegible] fuel corporation" v. *Taylor* (1940) 309 U. S. 619, 60 S. Ct. 469.

McGoldrick v. *Al H. Du Grenier, Inc.* (1940) 309 U. S. 70, 60 S. Ct. 404.

McGoldrick v. *Felt & Tarrant* (1940) 309 U. S. 70, 60 S. Ct. 404.

(The last two cases were decided with a single opinion.)

In these four cases the attack on the validity of the tax raised but one question, as this Court pointed out:

> "* * * whether the * * * tax * * * as applied to respondent infringes the commerce clause of the Federal Constitution."
>
> (309 U. S. at p. 41; 60 S. Ct. at p. 390)

Thus these cases have no bearing upon the issue of extraterritoriality which we are now discussing.[10]

Nor could any argument of extraterritoriality have been made against the tax. It was, as this Court pointed out,

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10. Respondent's brief to this Court in the Berwind-White case raised but two points: first, that the "tax" amounted to a burden on interstate commerce in violation of the commerce clause; and, second, that the "tax" was distinguishable from the "use taxes" previously held valid (See that brief, p. 19).

Neither of the two documents filed with this Court by Jagels makes any argument about the burden of tax collection or about extraterritoriality.

In the Du Grenier case, the record and the briefs contain no mention of the burden of tax collection, nor any reference to extraterritoriality.

In the Felt & Tarrant case, the brief of respondents at p. 2 states the "question presented" as: "Are sales of goods manufactured in Chicago, Illinois, by an Illinois corporation, which is not authorized to do business in the State of New York, subject to the New York City 'sales tax' * * *". While the brief does speak incidentally of the "compulsion * * * forcing an Illinois corporation to act as a collecting agency for the City", no separate argument is made on this point.

"* * * conditioned upon events occurring within the state, either transfer of title or possession of the purchased property, or an agreement within the state, 'consummated' there, for the transfer of title, or possession."

(309 U. S. at pp. 43-44; 60 S. Ct. at p. 391)

In each of the four cases, the party attacking the tax had engaged in intrastate activity with respect to the sales involved. In the *Berwind-White* case, a sales office was maintained within the city, all the contracts of sale were made within the city, and all the deliveries (except in connection with two transactions as to which this Court made no decision) were made within the city by the seller.[11] In the *Jagels* case, all deliveries were made by *Jagels* within the city.[12] Whether the sales were solicited there does not clearly appear.[13] In the *Du Grenier* case, all sales involved were solicited and all sales contracts

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11. See the statements in Respondent's brief to this Court in the Berwind-White case:

"All of respondent's contracts for the sale of coal to New York City customers are made in New York City (R. 76)"

(Respondent's brief, p. 4)

"* * * Respondent for the last forty years has maintained its own delivery system; it has owned and still owns railroad cars, barges, and tugboats, used in carrying the coal from the mines to the plants and steamships of its customers (R. 30, 31)".

(Respondent's brief, p. 7)

12. While the only papers filed in his Court by Jagels were a "Statement as to Jurisdiction", and a "Petition for Rehearing", the fact stated appears:

"In the case at bar possession of the coal was transferred within the city of New York".

(Petition for rehearing, p. 9)

13. The statement of petitioners in the case at bar at p. 17 of their brief that "the order was not apparently the result of personal solicitation by salesmen of the Jagels Company" is gratuitous. In the "Statement as to Jurisdiction" filed by Jagels in this Court it was said:

"It maintains for the convenience of its salesmen, an office, called a 'sales office', in New York City".

(Statement as to Jurisdiction, p. 3)

While the individual orders were in some instances 'phoned or mailed directly to Jagels' New Jersey office, doubtless these orders were part of a course of business obtained and serviced by personal calls by Jagels' salesmen.

were given to the agents of *Du Grenier* within the city.[14] In the *Felt & Tarrant* case all orders were solicited within the city and delivered from the New York office of *Felt & Tarrant's* local agent.[15]

These four cases are thus irrelevant on three distinct grounds: no issue of extraterritoriality was argued to or considered by this Court; no issue of extraterritoriality was presented by a tax which was both conditioned and measured by activities within the taxing jurisdiction; and no issue of extraterritoriality could have been presented because the activity of making the sales included substantial intrastate elements.

But an even more vital distinction between them and the present case can be drawn. This distinction turns upon the difference between the burden of a tax and the burden of acting as a tax collector from those on whom a tax is laid. The Iowa Use Tax Act imposes two distinct burdens: the burden of the use tax itself, which falls upon the Iowa purchaser and the activity of use within Iowa; and the other burden of acting as a tax collector for the state of Iowa which falls upon the seller and its activities outside Iowa. The respondent is not attacking the right and power of Iowa to impose a use tax, but is attacking the power of Iowa under the facts shown by the record to place upon it the separate and distinct burden and expense of acting as an agent of the state outside the state.

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14. See the record filed in the Du Grenier case before this Court, at pages 3, 34, 35, and 37. Respondent's brief in the Du Grenier case contained four points. The first three all stated reasons why the "tax" burdened interstate commerce. The fourth attempted to distinguish Felt & Tarrant Mfg. Co. v. Gallagher (1939) 306 U. S. 62, 59 S. Ct. 376. The respondent's brief asked that, if the "tax" be not found violative of the commerce clause, the case be remanded to the state court for consideration of the question of construction of the enabling Act. This was done.

15. See the record filed in this Court in the Felt & Tarrant case, p. 39.

While in the New York City "sales tax" cases the attack upon the statute was made by parties who were tax collectors rather than taxpayers, the attack nevertheless was solely upon the validity of the *tax*. No showing was made that the burden of acting as a tax collector was substantial; apparently no argument was made upon the validity of the collection provisions separate and apart from the validity of the tax itself. Certainly no such argument was considered or discussed by this Court.

The opinion of this Court in the governing case (the *Berwind-White* case) speaks of "the question for decision" as "whether the New York city *tax* laid upon sales of goods for consumption" as applied to respondent "infringes the commerce clause" (309 U. S. at p. 41; 60 S. Ct. at p. 390). The opinion further points out that:

> "The ultimate burden of the *tax*, both in form and in substance, is thus laid upon the buyer, for consumption, of tangible personal property, and measured by the sales price."
>
> (309 U. S. at p. 43; 60 S. Ct. at p. 391—italics added)

This Court recognized that:

> "The duty of collecting the tax and paying it over to the Comptroller is imposed on the seller in addition to the duty imposed upon the buyer to pay the tax to the Comptroller when not so collected."
>
> (309 U. S. at p. 44; 60 S. Ct. at p. 391)

but the whole opinion is concerned with the validity of the tax as determined by its incidence upon the *purchaser*. The tax was held valid because:

> "It is laid upon every purchaser, within the state, of goods for consumption, regardless of whether they have been transported in interstate commerce. Its only relation to the commerce arises from the fact that immediately preceding transfer of possession to the purchaser, *within the state*, which is the taxable

event regardless of the time and place of passing title, the merchandise has been transported in interstate commerce and *brought to its journey's end.* Such a *tax* has no different effect upon interstate commerce than a *tax on the 'use'* of property which has just been moved in interstate commerce * * *."

(309 U. S. at p. 49; 60 S. Ct. at pp. 393 and 394—italics added)

To this last sentence this Court significantly cites such decisions as *Monamotor Oil Co.* v. *Johnson* (1934) 292 U. S. 86, 54 S. Ct. 575, *Henneford* v. *Silas Mason Co.* (1937) 300 U. S. 577, 57 S. Ct. 524, and *Felt & Tarrant Mfg. Co.* v. *Gallagher* (1939) 306 U. S. 62, 59 S. Ct. 376, showing, especially by its reliance upon the *Silas Mason* case, how clearly the ultimate incidence of the tax upon the purchaser influenced the result. Another passage is equally significant:

"* * * we can find no adequate basis for distinguishing the present tax laid on the sale or purchase of goods *upon their arrival* at destination at the end of an interstate journey from the tax which may be laid in like fashion on the property itself."

(309 U. S. at p. 52, 60 S. Ct. at pp. 395 and 396—italics added)

The emphasis on the fact that the journey must end before the tax attaches shows how important the fact of incidence upon purchaser rather than seller appeared to this Court to be.

A final quotation will serve to show that, throughout, the issue turned upon the validity of the *tax* upon the purchaser rather than the burden of *tax collection* placed upon the seller:

"Here the tax is conditioned upon a local activity delivery of goods within the state upon their purchase for consumption. It is an activity which, apart from its effect on the commerce, is subject to the state taxing power."

(309 U. S. at p. 58, 60 S. Ct. at p. 398)

The *Berwind-White* and allied cases thus were limited to a discussion of the validity of a tax laid obviously upon intrastate activities, and measured by the price paid for the merchandise used, a measure with a direct relation to the value of the privilege of use. In consequence, no conflict between them and respondent's argument in the present case can possibly exist.

c. *Pierce Oil Corporation* v. *Hopkins* (1924) 264 U. S. 137, 44 S. Ct. 251

An Arkansas statute required the seller of gasoline for use in the state to collect a use tax. The statute was aimed at local and intrastate sales since it provided for reports by counties of "sales made within the county" and for payment of "the taxes accrued thereon" (See 264 U. S. at p. 138; 44 S. Ct. at p. 251). The validity of imposing the burden of collection was argued separately from questions as to the validity of the tax:

> "* * * the mere process of collecting the tax from the purchaser, and making monthly reports and payments, subjects the seller to an appreciable expense."
>
> (264 U. S. at p. 139; 44 S. Ct. at p. 251)

But the imposition of the duty to collect was upheld as a regulation of the intrastate business of selling—a local activity obviously involving exclusively the exercise of a privilege granted by the state:

> "* * * a state which has, under its Constitution, power to regulate the business of selling gasoline (and doubtless, also, the power to tax the privilege of carrying on that business) is not prevented by the due process clause from imposing the incidental burden."
>
> (264 U. S. at p. 139; 44 S. Ct. at p. 251)

Hence no question of extraterritoriality was or could have been decided.

d. *Monamotor Oil Co.* v. *Johnson* (1934) 292 U. S. 86, 54 S. Ct. 575.

This case involved two types of transactions: first, shipments of gasoline purchased outside the state, shipped to the Monamotor company within the state, and there sold by it; second, shipments from points in Oklahoma direct to customers of Monamotor in Iowa. The part of the decision with which the present case is supposed to conflict begins a few sentences before the end of page 94 of 292 U. S., fills nearly half of page 95 (54 S. Ct. at p. 579), and ends with the following clause quoted by the dissenting opinion in the present case:

> "* * * and the requirement that the appellant as the shipper into Iowa shall, as agent of the state, report and pay the tax on the gasoline thus coming into the state for use by others on whom the tax falls imposes no unconstitutional burden either upon interstate commerce or upon the appellant."

This passage related, as the opening sentence makes clear, to shipments direct from Oklahoma to customers in Iowa. The opinion does not clearly disclose all the pertinent facts which led the Court to say what it said. The shipments in question were made to Iowa customers "upon their orders taken in Iowa, and the gasoline to fill such orders was shipped direct from Oklahoma." (Pp. 78 and 79 of the Brief of Appellant in the *Monamotor* case before this Court) The passage quoted thus referred to sales comparable to those made by respondent's order offices in Iowa, as to which respondent has collected the use tax, and which are not in issue in the present case.

The statute before this Court in the *Monamotor* case was described in the opinion of this Court:

> "The law defines 'distributor' as 'any person who brings into the state * * * any motor vehicle fuel to be used within the state or sold or otherwise disposed of by him within the state for use in the state'. * * * It

is declared unlawful to conduct the business of a distributor unless * * * a license is procured permitting the conduct of that business. Every distributor is required * * * to file with the state treasurer a report showing the total number of gallons imported by him * * * and at the same time to remit to the treasurer the amount of the license fee * * *."

(292 U. S. at p. 89; 54 S. Ct. at p. 576)

The burden of tax collection consequently fell upon the privilege of acting as a distributor "within the state"; the measure was the amount of gasoline "imported by him" "to be sold or otherwise disposed of by him within the state". The privilege was exercised within the state and even the measure of the exaction contained no elements which did not involve intrastate activity embraced within the privilege. The case deals with an entirely different statute and an entirely different factual situation from the case at bar.

e. *Felt & Tarrant Mfg. Co.* v. *Gallagher* (1939) 306 U. S. 62, 59 S. Ct. 376.

This case was decided upon the authority of the *Monamotor* decision. The facts are comparable with the facts in the *Monamotor* decision. The sales of *Felt & Tarrant* were made on orders solicited within California by two general agents. The trial court found this to be an intrastate activity of *Felt & Tarrant*:

"The allegations of the bill respecting this phase of the case fully warrant the conclusion that plaintiff's method of doing business includes maintaining at least two places of business in California."

(*Felt & Tarrant Mfg. Co.* v. *Corbett* (1938) 23 Fed. Supp. 186, at p. 191)

But the intrastate activities of *Felt & Tarrant* were not limited to the mere solicitation of orders:

"Sometimes machines are forwarded directly to the purchasers, while in other instances, in order to

secure reduced freight charges, large groups of machines are shipped to the general agent who makes delivery to the respective purchasers."

(23 Fed. Supp. at p. 188)

Apparently the freight was paid by *Felt & Tarrant*. Records of customers were kept in California (See the Record filed with this Court, p. 27). The incidence of the burden of tax collection thus fell upon an activity which was substantially carried on within the State of California.

Summary.

The issue in the present case is not the validity of the use tax imposed by Iowa upon those who use respondent's merchandise within the state of Iowa, but the validity of an imposition of a different character—the burden of collecting this tax from respondent's customers.

The task of collection is an onerous one, involving expenses to the respondent over and above the respondent's liability for those portions of the tax which it fails to collect. These expenses equal a substantial portion of the tax itself.

The economic position of the respondent prevents it from passing the burden of this expense on to the consumer. Both physical difficulties inherent in the respondent's business, and the fact that direct competitors in the mail order field have no such burden, prevent the respondent from adjusting its prices upward to absorb the added expense. The practical as well as the formal incidence of the burden of tax collection therefore falls upon the respondent.

The burden placed upon the respondent is not a proper charge for any privilege exercised by the respondent and extended by Iowa.

If the burden be considered as a charge for the privilege of making sales for use in Iowa, the privilege is not one which receives protection from the state of Iowa, since the making of those sales occurs outside Iowa. Nor is the privilege in any direct way related to the exercise of an Iowa privilege, since all activities of the respondent in any way connected with the sales in issue occur outside Iowa.

The incidence of the imposition is upon activities over which Iowa has no control. The actual incidence of the burden is too clear to permit any claim that the burden may be justified as if laid on some other privilege. But if the burden be considered as a charge for the privilege of doing a retail store business in Iowa, no possible argument can be advanced that the measure of the charge relates to any protection extended by Iowa.

When the significance of the distinction between the burden of a tax and the burden of tax collection is fully realized, so also is the direct parallelism between the issue here presented and that decided in the *Connecticut General* case. All of the reasoning of the latter case urges the same conclusion upon the facts of the present case.

We respectfully submit that the consistent reasoning of this Court in its recent decisions, when applied to the facts here presented, leads to the conclusion that the Iowa Supreme Court decided the case rightly, and in the only manner which deference to the decisions of this Court permitted.

II. The Collection And Payment Provisions Of The Iowa Use Tax Statute Violate The Commerce Clause Of The Constitution.

Another argument, which is entirely separate and distinct from that of extraterritoriality, supports the result reached by the Supreme Court of Iowa. The burden of tax collection is so laid on the interstate commerce of the respondent as to place this commerce at a competitive disadvantage compared with intrastate commerce and hence offends Section 8, Clause 3, Article I of the Constitution.

Again the distinction between the economic burden of the use tax itself, which falls upon the purchaser within Iowa, and the economic burden of the duty to act as tax collector, which falls upon the respondent, is the determining element. Petitioners' brief, so far as it discusses the commerce clause, nowhere distinguishes between the two burdens and reads as if respondent's challenge was directed against the tax rather than against the additional burden of tax collection.

Assuming what is no longer a subject of debate, that use taxes do not infringe upon the federal power to regulate commerce no matter how momentarily the "taxable incident" follows the movement in commerce (such as the transfer of possession at the moment of delivery in *McGoldrick* v. *Berwind-White Coal Mining Co.* (1940) 309 U. S. 33, 60 S. Ct. 388), the question still remains whether a different but still substantial burden may be imposed upon a seller in interstate commerce.

The respondent submits that the burden of tax collection imposed upon it by the Iowa Use Tax Act, so far at least as concerns the sales included within the issues before this Court, is one which potentially subjects those sales to multiple burdens not imposed on intrastate trans-

actions. This argument is equally valid whether the burden of insuring tax collection in full, be considered the economic equivalent of the tax, or whether the added expense of collection be regarded as an independent charge for the privilege of engaging in the interstate commerce. In any event, the incidence of the burden is upon the activity of selling in commerce, and that activity is subject with equal right to a privilege charge in the other state or states in which the same commerce in its converse aspects takes place.

A. State laws which potentially subject commerce to multiple burdens violate the commerce clause.

In *Western Live Stock* v. *Bureau of Revenue* (1938) 303 U. S. 250, 58 S. Ct. 546, while recognizing that "commerce shall bear its share of local taxation", this Court further stated that:

> "* * * it shall not, on the other hand, be subjected to multiple tax burdens merely because it is interstate commerce."
>
> (303 U. S. at p. 259, 58 S. Ct. at p. 550)

The tax in that instance was upheld because it was

> "* * * not one which in form or substance can be repeated by other states in such manner as to lay an added burden on the interstate distribution * * *."
>
> (303 U. S. at p. 260, 58 S. Ct. at p. 550)

Referring to gross receipt taxes, the Court said:

> "The vice characteristic of those which have been held invalid is that they have placed on the commerce burdens of such a nature as to be capable in point of substance, of being imposed, * * * with equal right by every state which the commerce touches, merely because interstate commerce is being done, so that without the protection of the commerce clause it would bear cumulative burdens not imposed on local commerce."
>
> (303 U. S. at p. 255, 58 S. Ct. at p. 548)

Furthermore, the Court noted that:

> "All the events upon which the tax is conditioned * * * are beyond any control and taxing power, which, without the commerce clause, those states could exert through its dominion over the distribution * * *. The dangers which may ensue from the imposition of a tax measured by gross receipts derived directly from interstate commerce are absent."
>
> (303 U. S. at p. 260, 58 S. Ct. at p. 551)

The dangers ensuing from taxing the gross receipts from interstate transactions are of course the dangers that the tax if sustained,

> "would leave each state through which the commerce passes free to subject it to a like burden not borne by intrastate commerce."
>
> *McGoldrick* v. *Berwind-White Coal Mining Co.* (1940) 309 U. S. 33, at p. 57, 60 S. Ct. 388, at p. 398.

The danger was deemed present in *Adams Mfg. Co.* v. *Storen* (1938) 304 U. S. 307, 58 S. Ct. 913. This Court said:

> "The vice of the statute * * * (is) * * * that the exaction is of such a character that if lawful it may in substance be laid to the fullest extent by states in which the goods are sold as well as those in which they are manufactured. Interstate commerce would thus be subjected to the risk of a double tax burden to which intrastate commerce is not exposed, and which the commerce clause forbids."
>
> (304 U. S. at p. 311, 58 S. Ct. at p. 916)

B. To uphold the collection and payment provisions of the Iowa Statute would subject interstate commerce transactions to multiple burdens.

The sales involved in this case are sales over which other states may clearly exercise regulatory jurisdiction if they are removed from the protection of the commerce

clause on such grounds as those urged by petitioners. Both the contracts of sale and the sales themselves occurred outside the territorial limits of the State of Iowa. The tax collection required by the statute must necessarily be made at points outside the boundaries of Iowa. The states where the sales are made have a more obvious jurisdiction than Iowa to regulate the conduct sought to be controlled by Iowa unless the commerce clause protects such conduct from state regulation.

On the same reasoning as that advanced by the petitioners, Illinois could levy a charge for the privilege of making mail order sales to Iowa customers. As the sales are made in Illinois, the territorial jurisdiction of Illinois could not be questioned. The respondent would thus be subjected to regulation of the same conduct by two states. The burdens (whether of tax collection or tax payment) would be identical in incidence, but only interstate commerce would be subject to the double burden. Local enterprises, being regulated by only one state, would be given a competitive advantage over competitors engaged in interstate commerce.

The proposition is this: respondent is engaged in the activity of selling merchandise. Because of the fact that the respondent's merchandise is sold for use in Iowa, the respondent's activity of selling is subjected to a burden by Iowa—the burden of collecting the Iowa use tax. Because of the fact that respondent's activity of selling takes place in some other state, the same activity may be subjected to another burden imposed by the other state. The ability of both states to burden the activity of selling, if it is not withdrawn by the commerce clause, arises from the fact that the selling takes place in interstate commerce. But when the ability to impose a burden more than once arises out of the fact of commerce across state lines, then the commerce power of the Federal government extends its protection to prevent the double burden.

A clearer case for the application of the principles consistently recognized by this Court could hardly be imagined.

C. The cases cited by petitioners are not cases in which a potential double burden on interstate commerce appeared.

The petitioners cite, during the discussion of the interstate commerce point, only the four New York City "sales tax" cases, and *Felt & Tarrant* v. *Gallagher* (1939) 306 U. S. 62, 59 S. Ct. 376. In addition, and without comment, four other decisions of this Court, and three state court decisions, are cited to the point in petitioners' "Summary of Argument". The salient points of the decisions of this Court will be briefly mentioned in demonstration of their inapplicability.

a. *The four New York City "sales tax" cases.*

The inapplicability of the New York City "sales tax" cases is apparent from the discussion of them earlier in this brief. As *McGoldrick* v. *Berwind-White Coal Mining Co.* (1940) 309 U. S. 33, 60 S. Ct. 388, points out, the incidence of the New York City "sales tax" was upon the purchaser for use. It was imposed only after events in New York City had succeeded the passage in interstate commerce, and, to this Court,

> "Such a tax has no different effect upon interstate commerce than a tax on the 'use' of property which has just been moved in interstate commerce. * * *"
>
> (309 U. S. at p. 49, 60 S. Ct. at p. 394)

Certainly the purchaser could not be taxed by the state in which the movement in commerce started, since he was not within the jurisdiction of that state. So far as his purchase was concerned, it took place solely in New York City.

The incidence of the tax thus fell neither on the commerce nor upon the one who engaged in the commerce.

The cold truth is that the sellers in the four cases which reached this Court were more interested in attacking the tax than they were in attacking the burden of collection. Their position differs from the respondent. Whether the state of Iowa would eventually lose a cent of revenue if the decision of the Iowa Supreme Court be upheld by this Court is entirely speculative. The respondent is not asking, as the sellers in the New York City sales tax cases did ask, that this Court strike down a tax. All the respondent asks is that it be relieved of a burden which is onerous and real, and which is a charge upon the actual exercise of the privilege of engaging in interstate commerce which other states touched by that commerce might with equal right duplicate.

b. *Felt & Tarrant Mfg. Co.* v. *Gallagher* (1939) 306 U. S. 62, 59 S. Ct. 376.

In this case, the interstate commerce took place only at the option of the seller who actually made many of the deliveries from bulk shipments to its agents within California. The interstate commerce was thus incidental to the sale and the decision is comparable in reasoning to that of *Wiloil Corp.* v. *Pennsylvania* (1935), 294 U. S. 169, 55 S. Ct. 358, to be discussed shortly.

c. *McCarroll* v. *Dixie Greyhound Lines* (1940) 309 U. S. 176, 60 S. Ct. 504.

A state tax on gasoline in excess of twenty gallons in the tanks of trucks in interstate commerce when entering Arkansas was held in this case to bear no reasonable relation to the privilege of use of the Arkansas highways and hence void. This Court recognized that the carrier was exercising a state privilege—use of the highways—

for which it could exact a charge; but this Court found any relation between the charge levied and the privilege exercised to be absent. The concurring opinion contains this interesting passage on the relation that must exist between the measure of a charge and the privilege on which it is laid:

> "It must appear on the face of the statute or be demonstrable that the tax as laid is measured by or has some fair relationship to the use of the highways for which the charge is made."
>
> (309 U. S. at p. 181; 60 S. Ct. at p. 506)

The Arkansas tax was bad because:

> "That the relationship between tax and highway use does not in fact exist as the business is now conducted is demonstrated by appellant's showing * * *."
>
> (309 U. S. at p. 181, 60 S. Ct. at p. 507)

How this decision can in any way support the petitioners' argument is nowhere apparent.

d. *Wiloil Corp.* v. *Pennsylvania* (1935) 294 U. S. 169, 55 S. Ct. 358.

A Pennsylvania tax on liquid fuels "used or sold and delivered by distributors within this Commonwealth" was levied on fuel sold through an agent within Pennsylvania for delivery in Pennsylvania. The price quoted was "f. o. b." an out-of-state point. The tax was levied on fuel actually shipped to the purchasers from the out-of-state point. This Court said:

> "The inference that might be drawn from the f. o. b. order, the billing and straight bill of lading that the parties intended delivery to purchaser at place of shipment is negatived by other circumstances. * * * Appellant was not required by the contracts to obtain the fuels at Wilmington but was free to effect performance by shipping from any place within or without Pennsylvania. It is the practice in appellant's business to sell f. o. b. at a specified place in

order to fix the price and such billing may be merely price fixing * * *. Upon these considerations, the state Supreme Court held that the liquid fuels in question were by appellant 'sold and delivered' * * * in Pennsylvania."

(294 U. S. at pp. 173-174, 55 S. Ct. at pp. 359)

Consequently,

"These contracts did not require or necessarily involve transportation across the state boundary."

(294 U. S. at p. 174, 55 S. Ct. at p. 359)

Hence this Court concluded that the tax, being laid in consequence of the intrastate activities of sale and delivery, was not invalidated by seller's decision to ship the merchandise prior to delivery in interstate commerce. The rule permitting state taxation of goods at rest after interstate transportation was invoked by analogy:

"* * * it is not material whether the tax is upon the sale and delivery or upon the property."

(294 U. S. at p. 175, 55 S. Ct. at p. 360)

The final conclusion was:

"As interstate transportation was not required or contemplated, it may be deemed as merely incidental."

(294 U. S. at p. 175, 55 S. Ct. at p. 360)

In the case at bar, interstate commerce is always contemplated in connection with the "mail order sales" before this Court, and the carrier is selected by the buyer who pays the freight. No possibility of a double burden existed in the *Wiloil* case; the possibility is obviously and persistently present in the case at bar.

e. *Monamotor Oil Co.* v. *Johnson* (1934) 292 U. S. 86, 54 S. Ct. 575.

This case also involved a burden placed upon a seller within the state. While an advance payment of taxes later to be collected from the user was required monthly

as to all gasoline imported for sale within the state, the burden was upon the sale and distribution by the seller after the interstate commerce had ended. Even in the isolated case of shipments direct from Oklahoma to the buyer's address, the transfer of possession apparently did not take place until the shipment was ended or else the seller would not have been the "importer" within the meaning of the taxing statute. (The reports, as this Court noted, called on the distributor to report the gallonage "imported *by him* during the preceding calendar month".)"

The burden, just as in the *Wiloil, Felt & Tarrant*, and New York City "sales tax" cases, thus fell upon activities intrastate in character which included elements occurring after interstate commerce had ended and the property and activities had ceased to be under the protection of the commerce clause. Obviously no problem of multiple burden arises under such circumstances.

f. *Western Live Stock* v. *Bureau of Revenue* (1938) 303 U. S. 250, 58 S. Ct. 546.

We have cited this case as one of our principal authorities for the proposition that interstate commerce cannot be subjected to the possibility of duplicate burdens. This Court held that:

> "In the present case the tax is, in form and substance, an excise conditioned on the carrying on of a local business. * * * "
>
> (303 U. S. at p. 257, 58 S. Ct. at p. 549)

The measure of the tax was held proper because

> "The tax is not one which in form or substance can be repeated by other states in such manner as to

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18. See the discussion of the Stevenson case in the district court's opinion below at R. 72 and 73.

lay an added burden on the interstate distribution of the magazine."

(303 U. S. at p. 260, 58 S. Ct. at pp. 550-551)"

Summary.

The vital point in the case at bar is the distinction, clearly drawn by the pleading and the facts, between the burden of the tax which in theory at least falls upon the buyer, and the burden of collecting the tax.

The burden of having to act as a tax collector for the state of Iowa is one which the respondent, because of its competitive situation as well as because of the nature of its business, cannot shift to the consumer by a covering increase in prices.

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17. Three state cases are also cited by the petitioners:

a. State Board of Equalization v. Blind Bull Coal Co. (1940) 55 Wyo. 428, 101 Pac. (2nd) 70

Here a sales tax on the buyer was required to be collected by the seller. The seller was engaged solely in intrastate activities, delivering coal at the pit mouth to buyers. The purchasers then transported it into other states for consumption. However,

"The sales contracts did not involve any extrastate orders nor require interstate deliveries, but were made and fully performed in this state."

(101 Pac. (2d) at p. 71)

Here the transaction was completed before the interstate commerce began. Obviously the tax contained no treat of multiple burdens arising out of the commerce.

b. Hollis & Co. v. McCarroll (Ark. 1940) 140 S. W. (2d) 420

This case simply held, on the authority of the Berwind-White case, that a consumer's sales tax was due even though the retailer charged with the duty of collection, filled orders when merchandise was not carried in stock by sending them to third party manufacturers and distributors in other states for shipment direct to the customer. No distinction between the burden of the tax and the burden of collection was apparently argued to the court, which based its decision upon the "essential intrastate characteristics" of the sales transactions, saying:

"The contracts of purchase were made in this state. In each case appellant's undertaking was to supply the merchandise and the customer's obligation was to pay appellant. The transaction was consummated in Arkansas. The point from which shipment was made was merely incidental and of no concern to appellant's customer."

(140 S. W. (2d) at p. 423)

Such a holding obviously has no relevance to the problems presented by the case at bar.

c. United Autographic Register Co. v. McGoldrick, 21 N. Y. Sup. 1 (New York S. C., App. Div.—June 28, 1940)

This case arose under the New York City "sales tax", and involved solely the question of the interpretation of the tax act, validity being assumed. What logical relationship to the issue of constitutionality petitioners may think it possesses is impossible of ascertainment.

The burden of having to act as a tax collector is imposed upon the respondent and those similarly situated because of the carrying on of a retail business through the device of interstate mail orders. The burden consequently falls directly upon activities which constitute interstate commerce.

The burden is thus placed upon the privilege of engaging in such commerce and necessarily conflicts with the intent of the Founders to free that commerce from legislative barriers erected by the several states.

Stated another way, the burden is placed upon an activity which, because of its interstate commerce character, comes equally if not more clearly within the jurisdiction of other states. If the imposition of such a burden upon an activity of this character be upheld, other states may impose burdens of comparable weight upon the same activity with equal right.

If the privilege of selling Iowa customers may be made the subject of a charge by Iowa, the same privilege which is physically performed entirely within other states can be the subject of a charge by those other states which extend protection to it.

But this activity, except for its interstate commerce character, would normally be subjected to a single charge by a single state.

The challenged provisions of the Iowa Use Tax Act thus fall directly within the class of legislation which this Court has condemned because of its discriminatory effect on interstate commerce—legislation which may result in double burdens on interstate commerce made possible solely because of the fact of interstate commerce.

For this reason, independently of all other considerations, the result reached by the Supreme Court of Iowa was proper.

CONCLUSION.

The two propositions just advanced have been fully argued. They are the answers to the arguments of the petitioners.

But several other constitutional questions were raised by the pleadings, or are necessarily involved under the limiting construction of the challenged provisions for which the petitioners contend. Some of them are:

1. Does not the application of the challenged provisions solely to "mail order sales" amount to more than a construction of the statute to save its constitutionality? In other words, haven't the petitioners asked this Court to perform a legislative rather than a judicial task? Is not such a question one for the state court to decide?
2. Does not the application of the challenged provisions solely to "mail order sales" raise a serious doubt as to the validity of a classification between retailers making out-of-state sales for use in Iowa by mail and retailers equally within the jurisdiction of Iowa who make out-of-the-state sales for use in Iowa in other ways? Does not a statute involving such a classification which has no substantial basis in fact offend against the Fourteenth Amendment? Does not a statute so construed offend against various provisions of the Constitution of Iowa?
3. Does not the duty to collect a tax which arises at a time when the liability for the tax itself is not known, especially in the absence of provisions for refund of sums improperly collected, amount to a burden so uncertain and arbitrary as to be in itself offensive to the provisions of both the State and Federal Constitutions?
4. Does not the fact that the challenged provisions apply only to out-of-the-state sales and sales in inter-

state commerce, and that the burden imposed is heavier than imposed on intrastate retailers under the Iowa Sales Tax Act, make the burden one which discriminates against commerce between the states and within the other states?

5. Does not the fact that the statute imposes the burden on the seller of ascertaining what the purchaser of merchandise intends to do with it make the burden of tax collection on out-of-the-state sales or sales in interstate commerce a burden which discriminates against commerce between the states?

To discuss the arguments with which the affirmative of each of these propositions might be supported would lengthen this brief beyond proper limits. These other questions are present in the case, however, and deserve consideration if the result reached by the Iowa Court is in any doubt.

We have not discussed the supposed needs of Iowa which dictated the adoption of the challenged provisions. We believe them to be largely suppositious. But we live under a system of laws in which the needs of government, however great and urgent they may appear at the moment to be, must be balanced against certain fundamental limitations of power which are an integral part of the structure of government. The case at bar is one where every presumption in favor of the validity of a state law may be indulged in and still the answer must, on the logic of the latest pronouncements of this Court, be against the statute.

Respectfully submitted,

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